Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

PETER M. BRANT; WHITE BIRCH FARM, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1986 Calumet Farm, Inc. purchased a thoroughbred stallion from White Birch Farm, Inc. for $6,500,000. By March, 1991, Calumet owed White Birch $3,900,000 plus accured interest, of which at least $1.3 million of unpaid principal was in default under the promissory note it gave to White Birch in connection with the transaction.

On Friday, March 8, 1991, White Birch received $770,058.77 by FedWire electronic funds transfer from Calumet in apparent partial payment of the preexisting debt. The funds were credited and available to White Birch on that day. The following Monday, Calumet claimed its payment order was for only $77,058.77 but that its bank, First National Bank & Trust Co., had erroneously debited its account and sent White Birch $770,058.77. First National refused to re-credit Calumet's account any part of the difference, $693,000.00, on the grounds that Calumet's employee had made an error in sending its payment order. White Birch refused to return any portion of the funds transfer because Calumet owed more than the amount received and First National continued to deny it had made any error. First National later made a $500,000 secured loan to Calumet.

In June, 1991, Calumet filed a bankruptcy petition. During Calumet's bankruptcy, First National settled the claims of Calumet's estate by paying $50,000 and releasing its security for the $500,000 loan. As a consequence, the loan became uncollectible. First National then sued White Birch for restitution of $550,000, consisting of the uncollectible loan and the settlement payment. The bankruptcy court dismissed First National's claim because (i) First National suffered no loss in connection with the funds transfer and (ii) because White Birch did not have notice of any error before

the funds arrived on March 8, 1991 and, therefore, it was entitled to the benefit of the discharge for value defense. The court of appeals reversed. It made a *de novo* finding of fact, in contravention of First National's own pleadings, testimony and conduct, that the bank had made an execution error in connection with the funds transfer and that it was entitled to restitution of $550,000 from White Birch. It also held, in conflict with the Second and Seventh Circuits, that notice of error that arrives after the funds transfer is final but before the beneficiary of the funds transfer makes a bookkeeping entry discharging the debt, will deprive the beneficiary of the benefit of the discharge for value defense. It remanded the case for entry of a judgment in favor of First National.

The questions presented are:

1. Whether the court of appeals erred by ruling, in conflict with the Second and Seventh Circuits, that notice of a funds transfer error that arrives after the funds transfer is final but before the beneficiary makes a bookkeeping entry discharging the underlying debt will deprive the beneficiary of the discharge for value defense to a claim for restitution.

2. Whether the court of appeals violated White Birch's rights under the Due Process Clause of the U.S. Constitution by deciding a disputed issue of material fact in the first instance and in a manner that is contrary to the record.

3. Whether the court of appeals erred by ruling that First National, a bank which incurred no loss in connection with a funds transfer, is nevertheless entitled to restitution of its subsequent loan losses and litigation settlements from White Birch pursuant to section 4A-303(a) of the Uniform Commercial Code.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is under review are: (1) Peter M. Brant, an individual and White Birch Farm, Inc., a Connecticut corporation that is wholly-owned by Mr. Brant, Defendants-Appellees, and (2) First National Bank and Trust Co., a Kentucky banking corporation, Plaintiff-Appellant. There is no parent or publicly held company owning 10% or more of the stock of White Birch Farm, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Peter M. Brant and White Birch Farm, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which was issued on February 17, 2005, is published at 398 F.3d 555 (6th Cir. 2005). (App. at 3a) Petition for rehearing was denied without opinion by unpublished order issued on March 16, 2005. (App. at 1a).

Unpublished opinion of the United States Bankruptcy Court for the Eastern District of Kentucky issued on December 22, 1993. (App. at 79a)

Unpublished opinion of the United States District Court for the Eastern District of Kentucky issued on June 13, 1995. (App. at 64a)

Unpublished opinion of the United States Court of Appeals for the Sixth Circuit issued May 14, 1997 and reported at 1997 WL 253278 (6th Cir. May 14, 1997). (App. at 51a)

Unpublished opinion of the United States Bankruptcy Court for the Eastern District of Kentucky issued on April 25, 2002. (App. at 28a)

Unpublished opinion of the United States District Court for the Eastern District of Kentucky issued on March 31, 2003. (App. at 17a)

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on February 17, 2005, and its order denying rehearing on March 16, 2005. (App. at 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The primary statute involved is section 303(a) of Article 4A of the Uniform Commercial Code, which is incorporated into federal law by Federal Reserve Regulation J, 12 C.F.R. § 210.25-.32. That statute states:

> A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under Section 4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

Section 4A-303(a) authorizes a bank to seek restitution from the beneficiary if the bank has committed an execution error -- if it has sent more than the amount of the originator's payment order.

In addition, UCC §§ 4A-205 and 4A-405(c) provide that, where the originator of a funds transfer (in this case, Calumet) has, by mistake, issued a payment order to its bank for more

than was intended, the bank is entitled to payment of the full amount of the mistaken payment order and the originator must recover the mistaken payment from the beneficiary. *See* UCC § 4A-205, Official Comment 1; UCC § 4A-405(c).

STATEMENT OF THE CASE

In the opinion below, the Sixth Circuit announced a non-uniform rule, in conflict with the Second and Seventh Circuits, that creates uncertainty regarding the finality of all electronic funds transfers beyond the point at which the drafters of Article 4A of the Uniform Commercial Code intended that they be final. In so doing, the court of appeals also decided a disputed issue of material fact *de novo*, in contravention of the Due Process Clause.

In 1986, White Birch Farm, Inc. and Peter M. Brant (hereinafter "White Birch") sold a one-half interest in the thoroughbred stallion MOGAMBO to Calumet Farm, Inc. ("Calumet") in consideration of Calumet's promissory note in the original principal sum of $6,500,000.00 (the "MOGAMBO Note") and other consideration. By early 1991, Calumet was in default for non-payment of principal and interest under the MOGAMBO Note in the amount of not less than $1,300,000.00. Prior to March, 1991, Calumet had promised White Birch that it would pay the overdue interest and make a substantial payment of outstanding principal.

On Friday, March 8, 1991, a Calumet employee contacted Calumet's bank, First National Bank and Trust Co. ("First National"), to initiate a funds transfer to White Birch to make a payment on the MOGAMBO Note. Following that conversation, a First National employee debited Calumet's account the sum of $770,301.58 and transferred that sum via FedWire to White Birch's account at Citibank in New York

City. The funds were credited to White Birch's account on Friday, March 8, 1991.

On the following Monday, March 11, 1991. a three-party dispute erupted over the funds transfer. Calumet contended its employee had ordered a funds transfer to White Birch in the amount of $77,301.58, but that First National's employee, by mistake, had debited and transferred the sum of $770,301.58. First National, however, denied it made a mistake and contended (and later pled) that it executed Calumet's order for a funds transfer in the amount of $770,301.58 exactly as it was instructed by Calumet. Both Calumet and First National demanded that White Birch return the difference, the sum of $693,000. White Birch refused to return any portion of the transfer because, on March 8, 1991, Calumet owed White Birch far more than the full amount of the funds transfer and White Birch was entitled to retain the funds under the express terms of the MOGAMBO Note.

During the ensuing weeks, Calumet demanded First National re-credit its account $693,000. First National refused on the grounds it had done nothing wrong and White Birch had not returned any part of the funds transfer. Calumet threatened to sue First National for massive compensatory and consequential damages arising from acute financial problems arising from First National's refusal to re-credit the account.

On or about March 29, 1991, First National made a secured loan in the amount of $500,000.00 to Calumet. As partial consideration for the loan, Calumet waived its claim against First National for incidental and consequential damages arising from First National's refusal to re-credit Calumet's account the sum of $693,000.00. The loan did not,

however, resolve Calumet's claim it was entitled to have its account re-credited.

In June, 1991, Calumet filed a petition under Chapter 11 of the Bankruptcy Code. During that proceeding, which later was converted to a case under Chapter 7, Calumet, First National and White Birch settled all claims arising from the funds transfer other than First National's claim against White Birch for restitution of the disputed portion of the funds transfer. White Birch paid Calumet $75,000.00 to settle Calumet's claim for restitution of $693,000.00 against White Birch. To settle Calumet's claim for $693,000 against First National, First National paid Calumet $50,000.00, released its security for the $500,000 loan and waived its right to the first $25,000 of any distribution from Calumet's bankruptcy estate to which it would otherwise be entitled on its prepetition general unsecured claim for the amount of the unpaid loan.

Article 4A of the Uniform Commercial Code establishes uniform rules to govern electronic funds transfers. That statute governs the funds transfer via FedWire at issue in this case. Federal Reserve Regulation J, 12 C.F.R. § 210.25-.32. Various sections of Article 4A address the parties' rights and remedies (i) when a bank makes an execution error by sending more than the amount of its customer's order and (ii) when a customer makes an order error by placing a payment order in an amount that is more than intended. In cases of a bank execution error, the statute provides that the bank is entitled to charge its customer the amount of the customer's order (not the amount transferred) and to recover from the beneficiary of the order the "excess payment" (the difference between the amount of the order and the amount transferred) to the extent allowed by the law governing mistake and restitution. UCC § 4A-303(a). In cases of a customer payment order error, however, the statutory scheme provides that the bank is

entitled to charge its customer's account the full amount of the erroneous order and the customer must recover the amount paid by mistake from the beneficiary. UCC § 4A-205, Official Comment 1; UCC § 4A-405(c). Therefore, the statutory scheme contemplates that the party who made a funds transfer error must bear the resulting loss. The party in error, however, may recover its loss from the beneficiary of the funds transfer to the extent allowed by the law of mistake and restitution.

First National sued White Birch for restitution in an adversary proceeding in the Calumet bankruptcy case. In its pleadings, First National unambiguously stated that Calumet's employee had made a payment order error and denied that its employee had made an execution error. White Birch responded that First National had no claim for restitution because First National debited Calumet's account the full amount of the funds transfer and, regardless who made the error, Calumet paid the full amount transferred to White Birch because First National debited and refused to re-credit the full amount of the transfer from Calumet's account. First National replied that its subsequent loan to and litigation settlement with Calumet was the legal equivalent of re-crediting Calumet's account and, therefore, it was entitled to seek restitution from White Birch pursuant to UCC § 4A-303(a).

The parties filed cross motions for summary judgment. The bankruptcy court ruled that First National lacked standing to seek restitution from White Birch because the excess funds properly belonged to Calumet once the bank debited Calumet's account and executed the wire transfer to White Birch. (App. at 80a) The bankruptcy court also held that White Birch had not been unjustly enriched and was not required to make restitution because Calumet's indebtedness

to White Birch exceeded the full amount of the funds transfer. *Id.* The district court affirmed the bankruptcy court's disposition of First National's claims in every respect in a memorandum opinion and order entered on June 13, 1995. (App. at 64a)

First National appealed the district court's order to the Court of Appeals for the Sixth Circuit. The court of appeals reversed the lower courts' ruling that First National lacked standing to seek restitution from White Birch and held that First National had standing to seek restitution from White Birch pursuant to UCC § 4A-303(a). In addition, the court of appeals held that the "discharge-for-value" defense, as set forth in *Restatement of the Law of Restitution* § 14(1) (1937), was available to White Birch and remanded the case to the bankruptcy court for a determination whether White Birch "had notice that the funds transfer had been made in error." (App. at 61a)

It is important to note that, in holding First National had standing to seek restitution pursuant to UCC § 4A-303(a), the Sixth Circuit implicitly decided *de novo* a hotly disputed issue of material fact that had not been addressed by either of the lower courts. UCC § 4A-303(a), by its express terms, applies only to cases in which a bank made an execution error by transferring more than the amount of its customer's payment order. Under that section, if a bank makes an execution error, it is entitled to charge its customer's account only the amount of the payment order but then may seek restitution of the "excess payment" from the beneficiary of the funds transfer to the extent allowed by the law of mistake and restitution.

The Sixth Circuit's finding of fact that First National made an execution error was contrary to and was directly

contradicted by (i) First National's contemporaneous conduct in refusing to re-credit Calumet's account, (ii) First National's own affirmative averments in its pleading in this case that it did not make an execution error and (iii) the deposition testimony of First National's own employee, who testified she did not make an execution error.

Absent the Sixth Circuit's erroneous and unsupported finding regarding what had been a disputed and previously unresolved issue of material fact, First National would have no statutory claim for restitution pursuant to UCC § 4A-303(a). That section applies *only* in cases of bank order errors. In addition, the court of appeal's strong inference that First National was *entitled* to restitution from White Birch unless White Birch could establish that it was entitled to the benefit of the discharge-for-value defense was equally inexplicable. In effect, the Sixth Circuit made a *de novo* ruling that White Birch had been unjustly enriched at First National's expense notwithstanding First National's steadfast refusal to recredit Calumet's account for any portion of the amount of the funds transfer.

The "discharge-for-value" defense is set forth in *Restatement of the Law of Restitution* § 14(1) (1937).

> A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

The forgoing statement of the rule does not address the precise event or point in time after which notice of mistake comes too late to deprive the transferee of the defense in the context of a funds transfer. **Panels of the Second and Seventh Circuits, however, have ruled that the relevant event is when the funds are credited to the beneficiary's account.** *See Banque Worms v. Bank America Intern.*, 928 F.2d 538 (2nd Cir. 1991); *General Elec. Capital Corp. v. Central Bank*, 49 F.3d 280, 284 (7th Cir. 1995). The primary policy considerations underlying the Second and Seventh Circuits' application of the notice exception are the interests in national uniformity and finality of wire transfers.

> Both the NCCUSL and ALI drafters of article 4A and the New York Legislature sought to achieve a number of important policy goals through enactment of this article. National uniformity in the treatment of electronic funds transfers is an important goal, as are speed, efficiency, certainty (i.e., to enable participants in fund transfers to have better understanding of their rights and liabilities), and finality. Establishing finality in electronic fund wire transactions was considered a singularly important policy goal. Payments made by electronic funds transfers in compliance with the provisions of article 4A are to be the equivalent of cash payments, irrevocable except to the extent provided in article 4A.

Banque Worms v. BankAmerica Int'l, 570 N.E.2d 189, 195 (N.Y. 1991)(Emphasis added; citations omitted).

On remand, the bankruptcy court adopted the interpretation and application of the notice exception to the discharge-for-value rule that had previously been announced by the Second and Seventh Circuits. (App. at 48a) In

addition, it held First National had failed to establish White Birch had notice of any error before the funds transfer was credited to White Birch's account on the afternoon of March 8, 1991 and, therefore, White Birch was entitled to avail itself of the discharge-for-value defense. (App. at 47a) It also held that First National's $500,000 loan to Calumet and its subsequent $50,000 settlement was not the legal equivalent of re-crediting Calumet's account. (App. at 48a) Accordingly, the bankruptcy court granted White Birch's motion for summary judgment and denied First National's motion for summary judgment. On appeal, the district court affirmed the rulings of the bankruptcy court. (App. at 27a)

On the second appeal to the Sixth Circuit, the court of appeals reversed. First, the Sixth Circuit adopted a novel application of the notice exception to the discharge-for-value defense in a funds transfer case that conflicted with the prior rulings by the Second and Seventh Circuits. The court of appeals ruled that the relevant event by which notice must be received is when the beneficiary makes a bookkeeping entry to credit the debtor's account, citing *NBase Communications v. American National Bank & Trust*, 8 F.Supp.2d 1071 (N.D.Ill 1998). (App. at 12a) That action necessarily occurs after the funds have arrived and the funds transfer has become final pursuant to the applicable provisions of Article 4A.

Second, the court of appeals reaffirmed its prior ruling that First National has a statutory right to seek restitution under UCC § 4A-303. (App. at 9a) Those rulings were necessarily predicated on the court of appeals' finding of fact that First National made an execution error because UCC § 4A-303 only applies to bank execution error cases. There is no basis in the record for that finding of fact, particularly if the record is viewed in a light most favorable to White Birch.

The finding conflicts with First National's own conduct, testimony and pleadings.

Finally, the court of appeals ruled that White Birch was unjustly enriched in the sum of $550,000 at First National's expense. (App. at 15a) In so ruling, the court of appeals was laboring under the mistaken belief that First National made the loan "solely to settle the lawsuit filed against it [by Calumet] as a result of the mistaken wire transfer." (App. at 15a) That factual conclusion, however, is contrary to the record. The loan did not settle Calumet's claim that First National was obligated to re-credit its account $693,000. At the time the secured loan was made, Calumet still claimed it was entitled to have its account re-credited $693,000. First National, on the other hand, expected Calumet to repay the $500,000 loan. The loan transaction only settled Calumet's claims for incidental and consequential damages arising from First National's refusal to re-credit Calumet's account the $693,000.

The ultimate result in this case, to this point, is that White Birch is required to make restitution to First National of the cost to First National of an uncollectible loan to Calumet and a settlement payment to its estate in bankruptcy. White Birch had no part in First National's decisions to incur those costs and did not benefit in any way from either one of them.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit, In Conflict With The Second And Seventh Circuits, Announced A Non-uniform Rule That Casts Doubt On The Finality Of All Electronic Funds Transfers.

Each business day, billions of dollars move through the banking system of the United States by electronic funds transfer. Article 4A of the Uniform Commercial Code, which is incorporated into federal law by Federal Reserve Regulation J, governs all electronic funds transfers transmitted by FedWire. The finality of funds transfers was one of the most important policy goals of the drafters of Article 4A. Funds transfers, when received by the beneficiary, were to be treated as the equivalent of cash. *Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189, 196 (N.Y. 1991).

Generally, an electronic funds transfer is final and irrevocable upon "acceptance" of the funds transfer by the beneficiary's bank. UCC § 4A-209(b). In addition, "acceptance" of the funds transfer by the beneficiary's bank generally discharges the underlying indebtedness of the originator of the funds transfer by operation of law. UCC § 4A-406. The drafters of Article 4A contemplated that, at that point, the funds in the beneficiary's account are the equivalent of cash.

As is discussed above, various provisions of the Uniform Commercial Code provide that a person who has suffered a loss as the result of his error in connection with a funds transfer (for example, a customer's payment order error or a bank's execution error) to recover the amount of the loss from the beneficiary of the funds transfer pursuant to the laws

governing mistake and restitution. UCC § 4A-205, Official Comment 1; UCC § 4A-405(c); UCC § 4A-303(a).

In appropriate cases, the beneficiary may interpose the discharge for value rule as a defense to such a restitution claim if, among other things, the beneficiary did not have notice of the error. *Restatement of the Law of Restitution* § 14(1) (1937). The Second and Seventh Circuits previously held that, in order to deprive the beneficiary of the benefit of the discharge for value defense, notice of the error must precede arrival of the funds. *Banque Worms v. BankAmerica Int'l.*, 726 F.Supp. 940, 942 (S.D.N.Y. 1989) *aff'd* 928 F.2d 538 (2nd Cir. 1991); *General Elec. Capital Corp. v. Central Bank*, 49 F.3d 280, 284 (7th Cir. 1995). The rule announced by the Sixth Circuit in this case, in reliance on an isolated district court decision applying the notice exception in a case where payment was made by check, subject to collection, rather than by wire transfer, directly conflicts with the prior decisions in the Second and Seventh Circuits. The Sixth Circuit held that notice of error that is received after the funds transfer is final but before the beneficiary makes a bookkeeping entry discharging the underlying indebtedness deprives the beneficiary of the benefit of the discharge for value defense.

The effect of the non-uniform rule announced by the Sixth Circuit in this case is that all funds transfers will remain open and potentially subject to recall for an indefinite period after other provisions of Article 4A contemplate that they are final. It makes the applicability of the discharge-for-value rule as a defense subject to the vagaries of the in-house accounting practices of the beneficiary of a wire transfer. The Seventh Circuit, in rejecting the rule that was adopted by the Sixth Circuit in this case, stated that exposing creditors who thought that their debts had been paid off to a lengthy period of

uncertainty during which they might be required to reverse the transfer would be the equivalent of pouring molasses on the payments system. *General Electric Capital Credit Corp. v. Central Bank*, 49 F.3d 280, 284 (7th Cir. 1995); 3 J. White & R. Summers, Uniform Commercial Code § 25-1 at 93-94 (4th ed 1995). The United States has a strong national interest in maintaining a fluid and efficient payments system. That interest is defeated by the effect of the Sixth Circuit's ruling in this case.

The rule adopted by the Sixth Circuit in this case directly conflicts with the prior decisions of the Second and Seventh Circuits applying the discharge-for-value rule. Further, it conflicts with every other reported decision that applies the notice exception in a wire transfer setting and the views of eminent commentators.[1] Therefore, the rule announced by the Sixth Circuit in this case defeats the important policy goal of national uniformity in the rules governing wire transfers, a goal that prompted the adoption of Article 4A.

The effect of the rule adopted by the Sixth Circuit is that wire transfers will remain open and non-final for an indeterminate period after the underlying obligation has been discharged by operation of law pursuant to UCC § 4A-406(a)

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[1] "A beneficiary who is a creditor of the originator of a funds transfer has no obligation to make restitution for payments mistakenly made to that beneficiary in the name of the originator -- even if the beneficiary has not changed its position in reliance upon the transfer by giving value -- unless the beneficiary obtained the funds through misrepresentation or had notice of the mistake before receiving the funds." 3 J. White & R. Summers, *Uniform Commercial Code* § 25-1 at 93 (4th ed. 1995), *citing* Section 4A-303, Comment 3 and *Banque Worms v. Bankamerica Int'l*, 928 F.2d 538 (2d Cir. 1991).

and (b). Bookkeeping entries do not create or extinguish liabilities; they merely document those events. Further, unless a business has an accounting system that has integrated subledgers for receivables and cash receipts, an entry documenting the reduction of the liability may not occur until month-end or year-end. While the Sixth Circuit speculated that, because of the time value of money, most recipients can be counted on to credit their debtors promptly (App. at 12a), White Birch respectfully submits that the time value of money will prompt recipients to promptly redeploy the funds received by wire and to reconcile their books later. Regardless, it is clear that the non-uniform rule announced by the Sixth Circuit, which it acknowledged is based on an imperfect analogy between checks and wire transfers,[2] defeats the "singularly important" national policy goal of finality in wire transfer transactions that was preserved in the earlier decisions of the Second and Seventh Circuits.

2. The Sixth Circuit Violated White Birch's Right To Due Process By Deciding A Disputed Issue Of Material Fact In The First Instance And In A Manner That Is Contrary To The Record.

The Due Process Clause requires a judicial proceeding which, observing the general rules established, follows forms of law appropriate to the case and just to the parties affected.

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[2]App. At 12a. The imperfection of the analogy is recognized in the Official Comment to Article 4A, which notes that: "attempts to define rights and obligations in funds transfers by general principles or by analogy to rights and obligations in negotiable instruments law or the law of check collection have not been satisfactory." Official Comment to UCC 4A-102, 2A ULA [Master ed.], 1990 Supp.Pamph. *quoted* in *Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189, 193 (N.Y. 1991).

Endicott-Johnson Corporation v. Encyclopedia Press, Inc., 266 U.S. 285, 288 (1924). The general rules established provide that the court of appeals' function is to review findings of fact by the lower court, not to make them *de novo*. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *Duffie v. Deere & Co.*, 111 F.3d 70, 73 (8th Cir. 1997).

In its first opinion in this case, the Sixth Circuit held that First National had standing to seek restitution under UCC § 4A-303(a). (App. at 57a) In so ruling, the Sixth Circuit necessarily made a crucial finding of fact: that First National made an execution error and that Calumet did not make an order error.

UCC § 4A-303(a) states:

> A receiving bank that (i) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order or (ii) issues a payment order in execution of the sender's order and then issues a duplicate order, is entitled to payment of the amount of the sender's order under Section 4A-402(c) if that Subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution. (Emphasis added)

By its express terms, UCC § 4A-303(a) applies *only* in cases of bank execution errors. Further, if the bank makes an execution error, it is entitled only to payment from the sender of the amount of the sender's order. Thus, a bank that makes an execution error must bear the initial loss arising from its "excess payment," but may seek to recover it from the

beneficiary to the extent allowed by the law governing mistake and restitution.

The Sixth Circuit's reference to First National's "transmission error" in its second opinion in this case (App. at 15a), explicitly stated the finding of fact that was only implicit in the court's first opinion. Neither of the lower courts considered, much less decided, the purely factual issue of who made the error in the wire transfer.

The court of appeals exceeded its function and violated White Birch's rights under the Due Process Clause by deciding, in the first instance, a disputed issue of material fact. Furthermore, it compounded its error by deciding the factual issue in a manner that conflicts with the pleadings and the other evidence of record.

In considering First National's motion for summary judgment, the court of appeals was required to construe all reasonable inferences in favor of White Birch, the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Board of Educ. of the City School Dist. of the City of Cincinnati v. Department of HEW, Region 5*, 532 F.2d 1070 (6th Cir. 1976). If the starkly conflicting evidence in the record viewed in the light most favorable to White Birch, there is utterly no basis for the court of appeals' finding of fact that First National made an execution error.

First, the court of appeals' finding conflicts with First National's own pleadings, in which First National explicitly denied it made an execution error. In its April 3, 1991 Answer and Counterclaim, First National averred:

The Facts

7. On March 8, 1991, a Calumet employee telephoned First National and requested First National to send a wire transfer of funds in the amount of $770,301.58 from a Calumet account at First National to a specified account of White Birch at Citibank, N.A., New York, New York. The Calumet employee further requested First National to indicate on the wire transfer "reference: MOGAMBO interest payment."

8. A First National employee accepted the telephone request for the wire transfer, wrote the wire transfer instructions described in paragraph 7 above on a sheet of paper, read the instructions back to the Calumet employee and received confirmation from the Calumet employee that the instructions were correctly received by First National. Calumet further requested that written confirmation of the wire transfer be mailed to Calumet, which First National agreed to do. The telephone call was then concluded.

9. The First National employee then examined the checking account records of Calumet at First National and determined that the account from which the wire transfer was requested had a balance in excess of $830,000 which were sufficient funds to cover the requested wire transfer. First National then executed the wire transfer precisely in accordance with Calumet's instructions. As requested, First National mailed written confirmation of the wire transfer to Calumet.

Second, the finding conflicts with evidence offered by First National. First National's own employee testified at

deposition she did not make an execution error. Ms. Lori Pettit testified that she wrote down the information provided by Calumet's employee, Ms. Hollearn, and that she read back the information she had written down. Her notes indicated the amount to be transferred was $770,301.58.

Third, the finding is inconsistent with inferences arising from First National's own conduct at the time. As the court of appeals recognized in its opinion, First National refused to acknowledge it made an execution error on March 11, 1991, even though White Birch offered to return the excess funds if it did so.

> First National requested that Brant return the additional $693,000 erroneously transferred to him, but Brant refused to return the money unless First National acknowledged in writing that it had made the error in transferring the funds.

(App. at 5a) Further, there is no dispute that First National refused to re-credit Calumet's account $693,000, as is required by UCC § 4A-303(a) in bank execution error cases.

The only evidence in the record that could support a conclusion that First National made an execution error was the disputed deposition testimony of Angela Hollearn, Calumet's employee, who denied she made a payment order error.

The Sixth Circuit's finding of fact that First National made an execution error was the crucial factual predicate for the court's summary judgment that First National has a statutory claim against White Birch for restitution pursuant to UCC § 4A-303(a). The court of appeals violated White Birch's constitutional rights and exceeded its authority by deciding

that issue of fact in the first instance. Further, the court's finding is contrary to the facts of record, particularly if they are viewed in the light most favorable to White Birch. Accordingly, the Supreme Court should intervene to correct the Sixth Circuit's erroneous ruling that First National is entitled to restitution from White Birch pursuant to UCC § 4A-303(a).

3. There Is No Basis In Law Or Fact For The Sixth Circuit's Conclusion That First National Is Entitled To Restitution Of Its Loan Losses And Settlement Payment From White Birch.

First National was not out of pocket one cent in connection with the funds transfer, regardless who made any mistake, because it debited Calumet's account for the full amount of the funds transfer and refused to re-credit any portion of it. First National argued and the court of appeals agreed, however, it was entitled to restitution from White Birch of the amount of its uncollectible $500,000.00 loan to Calumet and its $50,000.00 settlement payment to the Calumet bankruptcy estate. First National theorized that, had White Birch returned the $693,000 excess payment, it would have re-credited Calumet's account and, as a consequence, it would not later have been constrained to make the $500,000.00 loan or the $50,000.00 settlement payment. Therefore, First National claimed, White Birch had been unjustly enriched $550,000.00 at First National's expense.

The Sixth Circuit's ruling that First National is entitled to a summary judgment that White Birch was unjustly enriched at First National's expense in the sum of $550,000 appears to be predicated on the incorrect factual assumption by the court that, in consideration of First National's $500,000 loan,

Calumet agreed to release the bank from any liability arising from the wire transfer.

> Although White Birch has argued that $500,000 of the bank's claim was in the form of a loan to Calumet, the record makes clear that First National credited this amount to Calumet's account solely to settle the lawsuit filed against it as a result of the mistaken wire transfer.

(App. at 15a). That factual conclusion is not supported by the record. The loan transaction settled Calumet's claims for incidental and consequential damages arising from First National's refusal to re-credit Calumet's account $693,000, but it did not resolve Calumet's basic claim that it was entitled to a re-credit of $693,000. Therefore, at the time of the secured loan, Calumet still claimed it was entitled to the re-credit of $693,000 and First National expected Calumet to repay the $500,000 loan.

Absent a re-credit of $693,000, there was no "excess payment" for which First National could seek restitution pursuant to UCC § 4A-303(a). The $500,000 loan was not the legal equivalent of re-crediting the account. Re-crediting Calumet's account would have created an immediate and unconditional obligation of First National to pay $693,000 to Calumet or to its order. The loan transaction, in contrast, created an obligation of Calumet to repay First National $500,000 at maturity. The loan did not, however, discharge Calumet's claim it was entitled to the re-credit and did not satisfy First National's obligation to re-credit Calumet's account $693,000 if it in fact made an execution error.

First National is out $550,000 because it decided to make a $500,000 loan to a company that later filed bankruptcy and

then decided to pay the debtor's estate $50,000 and release its collateral to settle the estate's claims that First National unlawfully violated Calumet's rights in connection with the wire transfer. White Birch had no part in any of those decisions. The Sixth Circuit's ruling that White Birch was unjustly enriched by First National's loan and settlement transactions with Calumet was manifestly incorrect and works a miscarriage of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners,
Peter M. Brant and White Birch Farm, Inc.

Dated: June 13, 2005 .

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 03-5533

[Filed, March 16, 2005]

In re: CALUMET FARM, INC., Debtor;	)
FIRST NATIONAL BANK & TRUST COMPANY, Appellant	)
v.	)
PETER M. BRANT; WHITE BIRCH FARM, INC., Appellees	)

ORDER

Upon consideration of the petition for rehearing filed by the appellees,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leanord Green
Leanord Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-5533

[Filed, February 17, 2005]

In re: CALUMET FARM, INC., Debtor.	)
FIRST NATIONAL BANK & TRUST CO., Appellant,	)
v.	)
PETER M. BRANT and WHITE BIRCH FARM, INC., Appellees.	)

OPINION

RONALD LEE GILMAN, Circuit Judge. This case arises out of a botched electronic wire transfer from Calumet Farm, Inc. to Peter M. Brant and White Birch Farm, Inc. (collectively, White Birch). On Friday, March 8, 1991, Calumet initiated the wire transfer of $77,301.58 by a payment order to its bank, First National Bank & Trust

Company. This amount was calculated by Calumet as a payment of interest on its outstanding debt of over $1 million due to White Birch. When Calumet received written confirmation of the wire transfer from First National on the following Monday, March 11, 1991, it learned that $770,301.58, rather than $77,301.58, had mistakenly been transferred. White Birch refused to return the additional $693,000, and Calumet subsequently declared bankruptcy.

First National is now seeking restitution from White Birch for the excess payment. Both the bankruptcy court and district court ruled in favor of White Birch. The key issue on appeal is whether White Birch established the elements of the "discharge-for-value" defense to First National's restitution claim. For the reasons set forth below, we REVERSE the judgment of the district court and REMAND the case for the entry of judgment in favor of First National.

I. BACKGROUND

Most of the facts of this case were previously set forth by this court in *In re Calumet Farm, Inc.*, 1997 U.S. App. LEXIS 11724, No. 95-5953, 1997 WL 253278, at **1-2 (6th Cir. May 14, 1997) (unpublished), as follows:

> White Birch is a thoroughbred horse farm in Connecticut owned by Peter Brant. In 1986, Calumet purchased a one-half interest in the thoroughbred stallion Mogambo from White Birch and executed a $6,500,000 promissory note ("the Mogambo note") evidencing the obligation. On October 31, 1990, Calumet defaulted in making its annual principal payment of [$1,300,000] on the debt. Brant and J.T. Lundy, president of Calumet, reached an agreement whereby Calumet would make the payment on or

before March 15, 1991. Calumet also defaulted in making several intervening interest payments and, as of March 7, 1991, owed White Birch approximately $103,057.50 in interest and penalties.

On March 8, 1991, Lundy instructed Calumet's bookkeeper, Angela Holleran [properly, "Hollearn"], to pay the interest due to White Birch as of January 31, 1991, amounting to $77,301.58. Holleran thereupon called First National to arrange payment by wire transfer, and also called White Birch to inform it that a wire transfer payment was forthcoming; however, the substance of these conversations is disputed as to the amount that White Birch was to receive. The wire transfer, referenced as "MOGAMBO INT," was made to White Birch's account at Citibank in New York on March 8, 1991.

On March 11, 1991, Holleran received written confirmation of the wire transfer from First National and realized that $770,301.58, rather than $77,301.58, had been transferred. Holleran notified First National of the mistake and First National contacted Citibank to request reversal of the wire transfer. Because the money already had been credited to White Birch's account, Citibank refused to reverse the wire transfer. Thereafter, First National requested that Brant return the additional $693,000 erroneously transferred to him, but Brant refused to return the money unless First National acknowledged in writing that it had made the error in transferring the funds.

On March 27, 1991, Calumet filed suit against First National in Scott County Circuit Court alleging negligence and breach of contract with respect to the mistaken wire transfer. Because of Calumet's

precarious financial condition, Calumet and First National reached a partial settlement whereby First National agreed to lend Calumet $500,000, secured by Calumet's interest in the Mogambo note. Calumet also assigned to First National any right of recovery that it might possess against White Birch and agreed to release First National from any liability arising from the wire transfer. Although First National and Calumet had partially settled the state court action, First National filed an answer and counterclaim [actually, a third-party complaint] on April 4, 1991, asserting claims against White Birch. In the meantime, White Birch filed a complaint against Calumet in the United States District Court for the Eastern District of Kentucky, seeking the principal and interest due on the Mogambo note.

On June 11, 1991, Calumet filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Kentucky. In October 1991, the state court actions were removed to the Bankruptcy Court as adversary proceedings, and on December 12, 1991, the district court action was referred to the bankruptcy court.

Upon cross-motions for summary judgment, the bankruptcy court entered partial summary judgment in favor of White Birch on December 22, 1993. The court held that First National lacked standing to assert a restitution claim against White Birch, reasoning that the amount of a wire transfer, once debited from a depositor's account, belongs solely to that depositor; accordingly, the court held that only Calumet possessed standing to recover the transferred funds from White Birch. However, because Calumet owed

White Birch a sum well in excess of the amount of the wire transfer, the court held that White Birch had not been unjustly enriched and was not obligated to make restitution. The court then denied First National leave to file a second amended counterclaim to include claims for conversion and intentional interference with a contract, but allowed First National to assert other state-law claims.

On September 6, 1994, the bankruptcy court entered summary judgment in favor of White Birch on all remaining claims and entered its final order on October 27, 1994. [As part of the final settlement, First National agreed to pay Calumet $ 50,000 in addition to the $ 500,000 loan, which Calumet never repaid.]First National appealed the bankruptcy court's grant of summary judgment in favor of White Birch and the court's denial of leave to amend its counterclaim. The district court affirmed the bankruptcy court's decision in its entirety on June 13, 1995.

In May of 1997, this court reversed the grant of summary judgment in favor of White Birch, but also affirmed the denial of First National's motion for leave to amend its counterclaim. The case was remanded to the district court with instructions to return the matter to the bankruptcy court for further proceedings. This court held that "the bankruptcy court should make additional factual findings as to whether White Birch had notice that the funds transfer had been made in error and, thus, determine whether White Birch [could] successfully assert [the 'discharge-for-value'] defense to First National's restitution claim." 1997 U.S. App. LEXIS 11724, 1997 WL 253278, at *5.

In resolving cross-motions for summary judgment, the bankruptcy court determined on remand that there was insufficient evidence in the record to support a finding that White Birch had notice of the error in the amount transferred before the funds were credited to its account at Citibank. It therefore held that White Birch had satisfied the required elements of the discharge-for-value defense to First National's restitution claim. Accordingly, the bankruptcy court granted summary judgment in favor of White Birch and denied the cross-motion filed by First National. In March of 2003, the district court affirmed both determinations. First National now appeals, claiming that the lower courts failed to properly interpret and apply the discharge-for-value defense asserted by White Birch.

II. ANALYSIS

A. Standard of review

We review a district court's grant of summary judgment de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir. 2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

B. The discharge-for-value defense

In its earlier opinion, this court held that First National had standing to assert a claim for restitution under U.C.C. § 4A-303(a) (enacted as § 355.4A-303(1) of the Kentucky Revised Statutes and incorporated into Federal Reserve Regulation J, 12 C.F.R. §§ 210.25-31, which governs funds transfers). Section § 4A-303(a) provides as follows:

> A receiving bank that (I) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order . . . is entitled to payment of the amount of the sender's order under Section 4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

This provision authorizes a bank to seek restitution from the beneficiary of the excess payment if the bank committed an error in executing the payment order. In the prior opinion, this court noted that § 4A-303(a) incorporates the discharge-for-value defense. 1997 U.S. App. LEXIS 11724, 1997 WL 253278, at *4. The Restatement of Restitution defines the discharge-for-value defense as follows:

> A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, *if the transferee* made no misrepresentation and *did not have notice of the transferor's mistake*.

Restatement of Restitution § 14(1) (emphasis added). Thus, when a creditor receives what appears to be a payment on a debt from someone other than the debtor, the creditor becomes a bona fide purchaser and may keep the mistaken payment if the creditor discharges the obligation of its debtor prior to becoming aware of the mistake.

Section 14(1) of the Restatement, however, does not specify the point in time by which notice of the mistake must be received. Nor did this court's prior opinion in the present case address the issue. And the two other appellate courts that have concluded that the discharge-for-value rule applies to wire transfers also failed to focus on the timing question. *See Gen. Elec. Capital Corp. v. Cent. Bank*, 49 F.3d 280, 284 (7th Cir. 1995) (*GECC*); *Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 570 N.E.2d 189, 196, 568 N.Y.S.2d 541 (N.Y. 1991).

Isolated language in both of the above cases, however, indicates that the notice must occur before the funds arrive. *See Gen. Elec. Capital Corp.*, 49 F.3d at 284 (holding that "a creditor should be able to treat funds credited in apparent payment of a debt as irrevocably his, unless news of the error precedes arrival of the funds"); *Banque Worms*, 570 N.E.2d at 196 (explaining that "when a beneficiary receives money to which it is entitled and has no knowledge that the money was erroneously wired, the beneficiary should not have to wonder whether it may retain the funds; rather, such a beneficiary should be able to consider the transfer of funds as a final and complete transaction, not subject to revocation"). But the question in each case (as in this court's prior decision) was *whether* the discharge-for-value rule applies in this setting, not *how* it applies. Nor, at any rate, does the quoted language squarely address the point. In a wire transfer setting, is the relevant event when the beneficiary's bank receives the

money, or when the beneficiary learns that the money is in its account, or when the beneficiary credits the money to the debtor's account? Neither this court's prior decision, *GECC*, nor *Banque Worms* purports to consider the question, much less answer it.

Traditionally, the U.C.C. provides that payment in discharge of an obligation occurs under the first option--"at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer." U.C.C. § 4A-406(a). But this approach does not square with the notice exception to the discharge-for-value rule. Application of this U.C.C. definition of discharge would mean that the entity that must receive notice (here White Birch) is an entity other than the entity to whom the funds were wired (here Citibank). To divide the "receipt of payment" and "notice of error" elements between different entities makes little sense and at any rate is a recipe for reading the notice exception out of the rule.

Equally unpersuasive is the argument that the discharge-triggering event necessarily occurs only when the beneficiary has actual notice that funds have been placed in its account. Such notice may not connect the funds to a given debtor or to the size of the debtor's outstanding obligation. Furthermore, while actual notice of a mistake may of course be independently disclosed by the originator to the beneficiary, constructive notice of a mistake may also occur simply as a result of the size of the transfer when considered in connection with the name of the originator. In this case, for example, White Birch assuredly would have had constructive notice of the mistake if the transfer had been, say, for $7.7 million--if, in other words, First National had made a two-digit error rather than a one-digit error in transmitting Calumet's payment order. Any sensible application of the

discharge-for-value rule in this unique setting must account for constructive as well as actual notice of a mistake.

That leaves what seems to us to be the most desirable option--that the discharge-for-value defense will apply unless the beneficiary receives notice of a mistake before the beneficiary of the transfer credits the debtor's account. In addition to aligning the entity that receives notice of any mistake with the entity that receives the payment, and permitting constructive notice to trigger the rule, this approach is consistent with one of the underlying principles of the discharge-for-value rule; namely, that the creditor has given value for the mistaken payment. Nor, despite White Birch's suggestion to the contrary, will this approach undermine the discharge-for-value rule on the theory that the rule will kick in only after the beneficiary on its own terms makes an accounting of how the transfer should be credited. The time value of money being what it is, most commercial recipients of such transfers can be counted on to promptly credit the debtor's account. As in most settings, at any rate, the rule applies only to commercially reasonable accountings.

We note that a district court decision directly on point followed a similar analysis. In *NBase Communications v. American National Bank & Trust,* 8 F. Supp. 2d 1071 (N.D. Ill. 1998), the court held that notice was sufficient so long as the beneficiary of the payment learned of the mistake before recovering the check from a lock box. In reaching that conclusion, the court noted that the creditor must give value for the mistaken payment--by crediting the debtor's account--before receiving notice of the mistake in order to invoke the discharge-for-value defense. *Id.* at 1076-77. Checks and wire transfers, we acknowledge, do not offer a perfect analogy. The former are governed by state law, the latter by federal law, and the two are governed by different sections of the

U.C.C. But in the unique setting of applying the notice exception to the discharge-for-value rule, the reasoning of *NBase* aptly respects the principles of the rule and the realities of applying it to checks and wire transfers: "It is difficult to see what is unfair about requiring a bank to return money if it was notified of the mistaken payment before it gave value for the payment. For example, only *after* the crediting would it be unfair to require the innocent creditor to make restitution." *Id.* at 1077 (emphasis in original). So it is here.

Both the bankruptcy court and the district court, in taking up the case on remand, erred in focusing on when White Birch *received the funds* rather than on when White Birch *credited Calumet's account*. In doing so, both courts effectively wrote out the element of "discharge" from the discharge-for-value defense. The undisputed record shows that White Birch did not credit the funds to Calumet's account until the afternoon of March 11, 1991. First National offered the testimony of Calumet employee Angela Hollearn to prove that White Birch was aware well before then that Calumet had intended to wire only $77,301.58 to White Birch for the payment of accrued interest. The bankruptcy court ruled against First National on the basis that Hollearn's testimony was equivocal on the issue of to whom she spoke and what was said on March 8, 1991 when she allegedly conveyed to White Birch the fact that a wire transfer had been sent, the amount of the transfer, and how that amount had been calculated.

The district court likewise dismissed Hollearn's testimony on this point as too speculative. It therefore determined that First National had not established that White Birch had notice of the error before receiving the funds. Without deciding whether the lower courts erred in excluding the disputed testimony as a matter of law, *see M.B.A.F.B. Federal Credit*

Union v. Cumis Ins. Soc'y, Inc., 681 F.2d 930, 932 (4th Cir. 1982) (holding that a witness's testimony was admissible even though the witness admitted that it was only "possible" that he or his attorney had made certain statements), we note that there is no dispute that Hollearn notified White Birch of the error on the morning of March 11, 1991.

Furthermore, White Birch's behavior establishes that it was aware of the error as soon as it was informed of the wire transfer by its own bank. When White Birch discovered on the morning of March 11, 1991 that Citibank had credited its account for $770,301.58, it immediately transferred the additional $693,000 to Brant's personal account at Citibank, ostensibly so that "everything could be sorted out." It did not apply that amount to reduce Calumet's debt on the Mogambo note until later that day. If White Birch did not know or at least suspect that it had erroneously received the additional funds, it would have had no reason to segregate them into its owner's personal account. The fact that it segregated the precise amount of the overage, moreover, is strong evidence that White Birch knew exactly how much it was supposed to receive from Calumet. Even the wire transfer itself, after all, was referenced as "MOGAMBO *INT.*" (Emphasis added.)

Thus, even if the bankruptcy court and district court correctly determined that White Birch did not have notice of the error before receiving the funds, White Birch certainly had notice before crediting Calumet's account. We therefore hold as a matter of law that White Birch had prior notice of the mistake in the funds transfer for purposes of the discharge-for-value rule and cannot avail itself of that defense. First National is therefore entitled to restitution from White Birch.

Under normal circumstances, the amount of restitution would be the $693,000 overpayment. But here First National was able to settle Calumet's claim against it for a total of $550,000. First National conceded at oral argument that this is the true extent of its loss, and thus the measure by which White Birch has been unjustly enriched at the bank's expense. Although White Birch has argued that $ 500,000 of the bank's claim was in the form of a loan to Calumet, the record makes clear that First National credited this amount to Calumet's account solely to settle the lawsuit filed against it as a result of the mistaken wire transfer. If the bank has in fact recovered any of this "loan" in the Calumet bankruptcy proceedings, the district court on remand can take this into account in rendering the final judgment against White Birch. The district court is also free to consider whether First National is entitled to prejudgment interest on its restitution claim.

As a final point, we note that allowing White Birch to keep funds that no one intended for it to have when it received them would constitute a windfall to White Birch at the expense of First National. Returning the $ 550,000 paid out by First National to extricate itself from its transmission error will, however, put the parties in the same position that they would have been in had the error in transferring the funds not occurred. Although these equitable considerations do not trump the discharge-for-value defense in situations where the defense is applicable, they are pertinent here. White Birch should, in fact, consider itself fortunate that it is having to return only $550,000 of the $693,000 excess it received because First National was able to settle with Calumet for less than the amount of the mistaken transfer.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the judgment of the district court and REMAND the case for the entry of judgment in favor of First National.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTION

CIVIL ACTION NO. 02-310-KSF

[Filed, March 31, 2003]

IN RE: CALUMET FARMS, INC.,	)
Debtors,	)
	)
FIRST NATIONAL BANK & TRUST CO.,	)
Appellants,	)
	)
v.	)
	)
PETER M. BRANT and WHITE BIRCH FARM, INC.,	)
Appellees.	)

OPINION & ORDER

This matter is before the Court on appeal from the Order of Judge Joe Lee of the United States Bankruptcy Court for the Eastern District of Kentucky.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Statement of Facts

As set forth by the unpublished Sixth Circuit opinion *In re: Calumet Farm, Inc,* No. 95-5953, this case arose out of a wire transfer of $770,301.58 from Calumet Farm to Peter Brant and White Birch Farm, Inc. on March 8, 1991. Calumet initiated the wire transfer by a payment order to its bank, First National, and effected the transfer by Fedwire, the Federal Reserve's wire transfer system.

White Birch is a thoroughbred horse farm in Connecticut owned by Peter Brant. In 1986, Calumet purchased a one-half interest in the thoroughbred stallion Mogambo from White Birch and executed a $6,500,000 promissory note ("the Mogambo note") evidencing the obligation. On October 31, 1990, Calumet defaulted in making its annual principal payment of $1,300,000 on the debt. Brant and J.T. Lundy, president of Calumet, reached an agreement whereby Calumet would make the payment on or before March 15, 1991. Calumet also defaulted in making several intervening interest payments and, as of March 7, 1991, owed White Birch approximately $103,057.50 in interest and penalties.

On March 8, 1991, Lundy instructed Calumet's bookkeeper, Angela Hollerean, to pay the interest due to White Birch as of January 31, 1991, amounting to $77,301.58. Hollerean proceeded to call First National to arrange payment by wire transfer, and also called White Birch to inform it that a wire transfer payment was forthcoming; however, the substance of these conversations is disputed as to the amount that White Birch was to receive. The wire transfer, reference as "MOGAMBO INT" was made to

White Birch's account at Citibank in New York on March 8, 1991.

On March 11, 1991, Hollerean received written confirmation of the wire transfer from First National and realized that $770,301.58, rather than $77,301.58 had been transferred. Hollerean notified First National of the mistake and First National contacted Citibank to request reversal of the wire transfer. Because the money already had been credited to White Birch's account, Citibank refused to reverse the wire transfer. Thereafter, First National requested that Brant return the additional $693,000 erroneously transferred to him, but Brant refused to return the money unless First National acknowledged in writing that it had made the error in transferring the funds.

On March 27, 1991, Calumet filed suit against First National in Scott County Circuit Court alleging negligence and breach of contract with respect to the mistaken wire transfer. Because of calumet's precarious financial condition, Calumet and First National reached a partial settlement whereby First National agreed to lend Calumet $500,000, secured by Calumet's interest in the Mogambo note. Calumet also assigned to First National any right of recovery that it might possess against White Birch and agreed to release First National from any liability arising from the wire transfer. Although First National and Calumet had partially settled the state court action, First National filed an answer and counterclaim On April 4, 1991, asserting claims against White Birch. In the meantime, White Birch filed a complaint against Calumet in the United States District Court seeking the principal and interest due on the Mogambo note.

On June 11, 1991, Calumet filed a bankruptcy petition and in October of that year the state court actions were removed

to the Bankruptcy Court as adversary proceedings. On December 12, 1991, the district court action was referred to the Bankruptcy Court.

Upon cross-motions for summary judgment, the Bankruptcy Court entered partial summary judgment in favor of White Birch on December 22, 1993. The court held that First National lacked standing to assert a restitution claim against White Birch, reasoning that the amount of a wire transfer, once debited from a depositor's account, belongs solely to that depositor; accordingly, the court held that only Calumet possessed standing to recover the transferred funds from White Birch. However, because Calumet owed White Birch a sum well in excess of the amount of the wire transfer, the court held that White Birch had not been unjustly enriched and was not obligated to make restitution. The court then denied First National leave to file a second amended counterclaim to include claims for conversion and intentional interference with a contract, but allowed First National to assert other state-law claims.

On September 6, 1994, the Bankruptcy Court entered summary judgment in favor of White Birch on all remaining claims and entered its final order on October 27, 1994. First National appealed the Bankruptcy Court's grant of summary judgment in favor of White Birch and the Court's denial of leave to amend its counterclaim. The district court affirmed the Bankruptcy Court's decision in its entirety on June 13, 1995. First National appealed the decision of the district court, and the Court of Appeals reversed the grant of summary judgment in favor of White Birch; affirmed the denial of First National's motion for leave to amend its counterclaim; and remanded the case to the district court with instructions to remand the case to the Bankruptcy Court for further proceedings consistent with the Sixth Circuit's

opinion. The Sixth Circuit specifically held that upon remand, the Bankruptcy Court should make additional findings as to whether White Birch had notice that the funds transfer had been made in error and, thus, determine whether White Birch may successfully assert the discharge for value defense to First National's restitution claim.

B. Proceedings Before the Bankruptcy Court

In resolving cross-motions for summary judgment, the Bankruptcy Court determined that there was insufficient evidence in the record to support a finding that White Birch had notice of the error in the amount of the funds transfer before the funds were credited to its account at Citibank. Consequently, the Bankruptcy Court held, as a matter of law, that White Birch had satisfied the required elements for the discharge-for-value defense to First National's restitution claim. Accordingly, the Bankruptcy Court granted the motion of White Birch and Brant for summary judgment, and denied First National's motion for summary judgment.

II. ISSUES FOR REVIEW

First National appeals (1) whether the Bankruptcy Court erred in granting summary judgment to Peter M. Brant and White Birch with respect to First National's claims based on unjust enrichment and restitution and (2) whether the Bankruptcy Court erred by failing to grant summary judgment to First National with respect to its claims against Brant and White Birch on unjust enrichment and restitution.

III. JURISDICTION AND STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 158(a)(1), this Court has jurisdiction to hear appeals from final judgments and orders of the Bankruptcy Court. In reviewing the Bankruptcy Court's findings of fact, this Court applies the clearly erroneous standard. Fed. R. Bankr. P. 8013; *Investors Credit Corp. v. Battie (In re Battie),* 995 F.2d 85, 88 (6* Cir. 1993). The Bankruptcy Court's legal conclusions are reviewed *de novo. Id. The de novo* standard applies to all aspects of the lower court's summary judgment decision, including finding, that no genuine issue of material fact exists. *Bee, e.g., Municipal Securities v. Insurance Co. of North America,* 829 F.2d 7, 9 (6* Cir. 1987). The appellate court must draw all reasonable inferences in favor of the party opposing summary judgment below. *See, e.g., Blaine), v. American S.S. Co.,* 990 F.2d 885, 889 (6* Cir. 1993).

IV. ANALYSIS

A. White Birch's motion for summary judgment

It is undisputed that White Birch's "discharge for value:" defense to First National's restitution claim is an affirmative defense. The burden of proving an affirmative defense is on the party asserting the affirmative defense. *See, e.g., Desjardins v. Desjardins,* 308 F.2d 111, 118 (6* Cir. 1962). "Summary judgment is appropriate ff a party, after adequate opportunity for discovery, 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, *and on which that party will bear the burden of proof at trial.'" Tolton v. American Biodyne, Inc.,* 48 F.3d 937, 941 (6th Cir. 1995) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (emphasis added)).

As indicated by the Sixth Circuit, a critical issue to the success of the discharge for value defense is the time in which White Birch became aware that a mistake had been made with the wire transfer. First National has offered evidence that Calumet employee Angala Hollerean phoned White Birch at 12:24 p.m. on March 8, 1991, and told one of its employees that Calumet was sending $77,301.58 to White Birch's account at Citibank and what the figure represented. The wire transfer in the mistaken amount of $770,301.58 was then initiated at 1:17 p.m on March 8, 1991.

At the summary judgment stage, because White Birch has the burden of proof on the affirmative defense, First National merely must produce more than a scintilla of evidence tending to prove that White Birch had notice of the mistake before the transfer. The Court has reviewed the record pertaining to the notice issue, and *without* regard to credibility, finds that First National is without admissible evidence sufficient to defeat White Birch's motion for summary judgment.

As determined by the Bankruptcy Court, the testimony of Calumet employee Angela Hollerean is equivocal on the critical issue of when she spoke by telephone to someone at White Birch and allegedly informed the person she talked to that a wire transfer had been sent, the amount of the transfer, and how that amount was calculated. Hollerean's deposition reveals that she is unaware of which White Birch employee she talked to; instead, Hollerean merely speculates that it was one of the three individuals she normally talked to regarding wire transfers. Hollerean further qualified her testimony by acknowledging that she was not sure whether she called one of the three individuals or they called her. Later in the deposition, Hollerean admits that she was not sure whether she made the call, and merely assumed that she did. See Hollerean depo. p. 153 (A: I said that was probably me. Q:

Probably. You're not really sure whether that was the call or not, are you'?. A. No, but I was assuming it probably was since it was close to the wire transfer.) (emphasis added). The same standards for admissibility of evidence at trial likewise apply at the summary judgment stage. *See, e.g., Munoz v. Int T Alliance of Theatrical State Employees,* 563 F.2d 205, 207 n.1 (5th Cir. 1977).

For the specific purpose of proving that White Birch had notice of the mistake before the transfer, Hollerean's testimony is inadmissible as based upon speculation. Hollerean has specifically acknowledged her inability to remember the timing of the call and has speculated that it was one of the individuals with which she normally spoke. This equivocal portion of Hollerean's testimony is incompetent as a matter of law. See Fed. R. Evid. 602; *United States v. Sorrentino,* 726 F.2d 876, 886 (5th Cir. 1984); *United States v. Odom,* 736 F.2d 104, 109-16 (4th Cir. 1984): *M.B,4.F.B. Federal Credit Union v. Cumis* Ins. Soc 3', 681 F.2d 930, 932 (4th Cir. 1982). Even if Hollerean's testimony met the competency threshold for admissibility, a summary judgment motion cannot be defeated by offering speculative beliefs that contradict earlier deposition testimony. *See, eg., Gagne v. Northwestern Nat 7 Ins. Co.,* 881 F.2d 309, 315 (6th Cir. 1989). Here, Hollerean admitted that she was not sure she was actually the person involved in the call, and this contradicts her previous testimony that she was sure she talked to one of the three identified individuals employed by White Birch.

Turning to First National's motion for summary judgment, this Court agrees with the Bankruptcy Court's analysis of the discharge for value defense to a restitution claim. The Sixth Circuit has apparently not defined the parameters of this defense; thus, the Court is free to apply the doctrine as

defined by sister federal courts. The Restatement of Restitution defines the discharge for value rule as follows:

> A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

Restatement of the Law of Restitution § 14(1) (1937).

Case law further clarifies that unless the creditor receives notice of the error before the arrival of the funds, the creditor should be able to treat the funds mistakenly credited as irrevocably his. *See General Electric Capital Corp. v. Central Bank,* 49 F.3d 280, 284 (7* Cir. 1995) ("As the Court of Appeals [in *Banque Worms]* saw things, a creditor should be able to treat funds credited in apparent payment of a debt as irrevocably his, unless news of the error precedes arrival of the funds."); *see also, Banque Worms v. Bankamerica Int'l,* 928 F.2d 538 (2d Cir. 1991); *Nationwide Merchant Bank, Ltd. v. Star Fire Int'l.,* 889 F. Supp. 124 (S.D.N.Y. 1995); *Bank of America National Trust & Savings Association v. Sanati,* 14 Cal. Rptr. 2d 615 (Ca.1992).

Policy reasons adequately support the elements of the defense as reported in Seventh and Second Circuit cases. As emphasized by White Birch, the combination of UCC §§ 4A-209, 4A-403, 4A-404 and 12 C.F.R. 210.31 "are likely to cause instantaneous settlement of transfers done through Fedwire. 3 White & Summers § 23-2 at 28. The finality that the Fedwire system is supposed to promote is abrogated by

the approach suggested by First National and the corresponding uncertainty caused by this litigation which has ensued for more than a decade:

> [e]xposing creditors who thought that their debts had been paid off to a lengthy period of uncertainty during which they might be required to reverse the transfer would be the equivalent of pouring molasses on the payments system.

General Electric Capital Corp., 49 F.3d at 284.

First National relies on *Nbase Communications v. American Nat'l. Bank & Trust, 8 F.* Supp. 2d 1071 (N.D. Ill. 1998), as the sole legal authority for its "giving value" argument. *Nbase* involved the discharge for value defense in the context of a check transfer and not the instantaneous wire transfer involved in "this case. As stated above, this Court adopts the views of the Second and Seventh Circuits, and rejects any contrary lower court opinion. In essence, First National attempts to impute a detrimental reliance aspect to the discharge for value defense, contrary to the Sixth Circuit opinion remanding the case. *Compare Bank of America Nat'l Trust & Savings Ass'n,* 14 Cal. Rptr. 2d at 618 (distinguishing the detrimental reliance defense and the discharge for value defense to restitution claims). As determined by the Bankruptcy Court, there is evidence in the record, sufficient to deny First Nafional's motion for summary judgment, indicating that the fun. ds were "paid" to White Birch on March 8, 1991 pursuant to UCC § 4A-405(a)[1]

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[1] First National's objections to the Steike affidavit are not well-taken. The affidavit was actually filed in response to First National's motion for summary judgment and is properly before the

V. CONCLUSION

For the foregoing reasons, the Court, being fully advised, HEREBY ORDERS that

(1) the Bankruptcy Court's entry of summary judgment in favor of Brant and White Birch on First National's restitution and unjust enrichment claims is AFFIRMED;

(2) The Bankruptcy Court's denial of First Nafionars summary judgment motion on its restitution and unjust enrichment claims is AFFIRMED;

(3) a judgment will be entered contemporaneously with this opinion and order.

This 31st day of March, 2003.

Court. Based upon the evidence in the record, Steike is competent and can testify based on personal knowledge to the matters addressed in the affidavit.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Case No. 91-51414

[Filed, April 25, 2002]

In Re:	)
Calumet Farm, Inc.,	)
Debtor.	)
	)
Calumet Farm, Inc.,	)
Plaintiff,	)
	)
v.	)
	)
White Birch Farm, Inc.Peter M. Brant	)
and First National Bank & Trust	)
Company	)
Defendant.	)
	)

MEMORANDUM OPINION

Calumet Farm, Inc. ('Calumet") filed a petition for relief under chapter 11 of the Bankruptcy Code in this court on July 11, 1991.

Prior to bankruptcy Calumet had filed the present action in state court, the Scott County Circuit Court, against the defendant, First National Bank of Georgetown, Kentucky ("First National") for restitution of the amount by which a Fedwire funds transfer from Calumet's account at First National to the account of White Birch Farm, Inc. ("White Birch") at Citibank, New York, New York, was alleged to have exceeded the amount authorized to be transferred by Calumet. White Birch and Peter M. Brant ("Brant"), the sole shareholder of White Birch, were subsequently added as defendants in the action.

This action, a related action by Calumet against First National, White Birch and Connecticut Bank & Trust Company, in the Scott circuit court, and an action by White Birch against Calumet in the U.S. district court, in all of which the controversy over the wire transfer was at issue, were removed or transferred to the bankruptcy court and were consolidated for purposes of trial.

At issue is the unresolved cross-claim of the defendant First National against the defendants White Birch and Brant (collectively "White Birch") for restitution.

The matter is before the court on remand from the district court pursuant to the direction of the court of appeals for this circuit.

The court of appeals held that the discharge-for-value rule is available to White Birch as a defense to First National's restitution claim, which is based on U.C.C. § 4A-303(a) and its commentary. The appellate court found it could not determine the applicability of that defense in the present case until genuine issues of material fact are resolved by the

bankruptcy court with respect to "whether White Birch had notice that the funds transfer had been made in error."

Calumet contended it had requested a wire transfer in the amount of $77,301.58. First National executed a wire transfer in the amount of $770,301.58. That amount was deducted from Calumet's account at First National and credited to White Birch's account at Citibank on Friday, March 8, 1991.

FINDINGS OF FACT

The debtor-creditor relationship between Calumet and White Birch relates back to the mid-1980's. On August 28, 1986 the parties entered into the Mogambo Agreement of Purchase and Sale. White Birch and Brant, the sole shareholder of White Birch Farm, Inc. of Greenwich, Connecticut, (collectively "White Birch") agreed to sell to Calumet a one-half interest in the colt Mogambo for $6,500,000.00. The colt was to be retired from racing at the end of the 1986 racing season and delivered to Calumet Farm

in December 1986 to stand at stud under the terms of the agreement. Each of the co-owners, White Birch and Calumet, agreed to pay one-half of the costs and expenses incurred in the board, keep, transportation, care and breeding of the stallion, for which they were to be billed quarterly by the stallion manager, J.T. Lundy ("Lundy"), who was the president of Calumet Farm, Inc.

On September 30, 1986, in payment for its one-half interest in Mogambo, Calumet executed a promissory note payable to White Birch and Brant in the principal amount of $6,500,000.00. The principal amount of the note was to be paid in five equal consecutive annual installments in the amount of $1,300,000.00 commencing October 31, 1988, and continuing each October 31st thereafter with final payment of principal due on October 31, 1992.

In addition the note required Calumet to pay accrued interest on the unpaid principal balance of the note in quarterly installments commencing on October 31, 1986, and continuing on each January 31, April 30, July 31, and October 31 thereafter so long as any indebtedness on the note remained outstanding.

In what Mr. Brant described as a back-to-back note transaction, White Birch pledged the $6,500,000.00 Calumet note to Connecticut Bank & Trust Company as collateral for a loan in the amount of $6,600,000.00, the proceeds of which White Birch used to purchase six lifetime breeding rights to Alydar, a prominent stallion owned by and standing at stud at Calumet. Brant anticipated using payments from Calumet on the $6.5 million note to fund payments White Birch was obligated to make to Connecticut Bank & Trust Company on the $6.6 million note. See Deposition of Peter M. Brant, 6-5-91, pgs. 23-27.

Apparently Calumet made the annual payments of $1.3 million that became due on October 31, 1988 and October 31, 1989. Calumet failed to make the $1.3 million payment that was due on October 31, 1990. The unpaid principal balance of the note at that time was $3.9 million.

An interest payment on Calumet's note to White Birch also became due on October 31, 1990, concurrently with the $1.3 million payment due on the principal balance of the note. Calumet also failed to make the interest payment.

In November of 1990 the stallion Alydar suffered a leg injury while housed in a stall at Calumet Farm. When surgery to repair the injury was unsuccessful the stallion was "put down" by lethal injunction on November 15, 1990. White Birch's $6.6 million investment in the six lifetime breeding rights to Alydar no longer had value. The breeding rights had entitled White Birch to breed six mares annually to Alydar. White Birch could breed its own mares to the stallion or sell the breeding rights to others for $200,000.00 to $250,000.00 each, the stud fee for breeding a mare to the stallion. Such breeding rights were insurable. White Birch received an insurance settlement of $1,275,000.00, the proceeds of which were paid on White Birch's note to Connecticut Bank & Trust Company. In June of 1991 White Birch still owed $2,640,000.00 on the note. *See* Brant Deposition 6-5-91, pg. 30.

In December of 1990 Brant and Lundy apparently reached an agreement to the effect that if Calumet would wire White Birch the delinquent interest on the Calumet note White Birch would defer the overdue principal payment Of $1.3 million until March 15, 1991. *See* White Birch Exhibit No. 3 to Deposition of John Allen Kosowsky 6-5-91; Brant Deposition 6-5-91, pgs. 23-35.

In conversations between Lundy and Brant, Lundy had asked Brant to hold off on collection efforts until after the January 1991 Keeneland Association thoroughbred horse sale. Lundy apparently promised to make payments on the Calumet note from proceeds from the sale of several thoroughbred horses Calumet had placed in the sale. However, the reserve bid Calumet had placed on its horses exceeded the bids of purchasers. As a result Calumet bought back a number of the horses. The sale did not produce enough money to enable Calumet to make the $1.3 million overdue payment on the principal of the note to White Birch. It is possible the delinquent interest payment was made.

Meanwhile, the January 31, 1991 interest payment became due on the Calumet note to White Birch. On January 28, 1991 Richard Angotta, an accountant for White Birch, caused to be faxed to Calumet a statement for interest due in the amount of $98,150.00. *See* White Birch Exhibit No. 6 to Kosowsky Deposition 6-5-91.

On February 12, 1991, Mr. Kosowsky, the head of Brant Industries' accounting office, wrote Mr. Lundy a demand letter noting that as of that date Calumet had failed to make the January 31, 1991 interest payment. The letter demanded payment of the $98,150.00 interest payment, plus a penalty for late payment, by February 22, 1991 and payment of the $1.3 million past due principal payment by March 15, 1991, as promised. See White Birch Exhibit No. 4 to Kosowsky Deposition 6-5-91.

On February 21, 1991 Mr. Brant wrote Mr. Lundy a letter stating Connecticut Bank & Trust Company was pressuring him daily and was getting ready to foreclose which would cause him great financial disorder. He stated that Calumet must honor the commitment to pay interest on the

Calumet note in February and make the $1.3 million payment on principal in March. *See* White Birch Exhibit No. 5 to Kosowsky Deposition 6-5-91.

The letters identified as White Birch Exhibits Nos. 4 and 5 were faxed to Mr. Lundy at Calumet on the approximate dates of the letters.

On February 26, 1991 Mr. Kosowsky wrote a note to Mr. Lundy stating that Mr. Brant had told him Calumet would be paying interest due White Birch by February 28, 1991. The letter stated the amount due was $103,057.50. This letter and a statement of the amount due, which included a 5% penalty of $4,907.50, was faxed to Mr. Lundy at Calumet on February 26, 1991. *See* White Birch Exhibit No. 8 to Kosowsky Deposition 6-5-91. Mr. Kosowsky's letter requested that the funds in payment of the amount due be wired to White Birch Farm, Inc. account no. 37159402, Citibank, New York, New York.

On March 7, 1991 Jean Bickley, a White Birch employee, at the direction of Mr. Brant, faxed to Calumet a duplicate statement for the January 31, 1991 interest payment due in the amount of $98,150.00, plus a penalty of $4,907.50, indicating a total amount due of $103,057.50.

On March 7, 1991 Angela Hollearn, a bookkeeper at Calumet, discussed this fax and accompanying statement with Mr. Lundy. Initially he told her to pay the interest but not the penalty.

Before making the payment Ms. Hollearn checked the billings she had sent to White Birch for White Birch's share of the cost of upkeep of the stallion Mogambo. She determined Calumet was owed $18,978.27 by White Birch for

its share of the board bill for Mogambo, and an additional $6,777.65 for the Alydar special interest breeding rights account, or a total of $25,755.32. On March 8, 1991 Mr. Hollearn discussed these offsets with Mr. Lundy. He told her to pay the entire amount of the interest, including the penalty, less the deductions for the amounts White Birch owed to Calumet. Ms. HolleaRN computed the amount to be wire transferred to White Birch as $77,301.58. *See* Hollearn Exhibit No. 4 to her deposition of April 24, 1991.

According to Ms. Hollearn she called First National at ten till 12:00 on March 8, 1991 and asked to speak to Richard (Dick) Rogers, senior vice president and cashier at the bank. The call was transferred to his office. Mr. Rogers was out to lunch. Lori Pettit, an accounting clerk, answered Mr. Rogers' office telephone. Ms. Hollearn told Ms. Pettit she needed to make a wire transfer from the Calumet farm general account at the bank, account no. 15-041-868-01, to Citibank, New York, New York, ABA# 021000089, for the account of White Birch Farm, inc., account no. 37159402.

Relying on her notes, Hollearn Exhibit No. 4, Ms. Hollearn testified she told Ms. Pettit to make a wire in the amount of $77,301.58. When Ms. Pettit repeated the information, Ms. Hollearn affirmed that it was correct. *See* Hollearn Deposition, April 24, 1991, pgs. 51-58.

Relying on her notes, Petit Exhibit No. 1, Ms. Pettit testified she wrote down the information given to her by Ms. Hollearn. She read back to Ms. Hollearn the information she had taken down. Her notes indicated the amount requested to be transferred was $770,301.58. According to Ms. Petit, Ms. Hollearn confirmed the amount as correct.

After checking to make sure Calumet had sufficient funds in its account, Ms. Pettit initiated the wire transfer in the amount of $770,301.58 at 13:15:44 p.m. on March 8, 1991.

There is a discrepancy in the testimony of these two ladies as to the time of the telephone call from Ms. Hollearn requesting the wire transfer. Ms. Hollearn testified she made the call at ten to 12:00 on March 8, 1991. Ms. Pettit recalled she took the call at about 1:00 o'clock p.m. and made the wire transfer at approximately 1:15 p.m.

The Calumet telephone logs indicate a 3-minute telephone call was made from the farm office to First National at 11:45 a.m. on March 8, 1991.

The error with respect to the amount of funds to be transferred from Calumet's account at First National to White Birch's account at Citibank occurred during this 3-minute telephone call between Ms. Hollearn and Ms. Pettit. The error did not result from a mistake in encoding the Fedwire machine or from a technical failure in the Fedwire system.

There is no evidence that White Birch mislead Calumet in any manner that contributed to the error.

The evidence to support a finding that White Birch was alerted to the error before the $770,301.58 was credited to its account at Citibank was March 8, 1991 is inconclusive.

The letters of February 12, 1991 and February 21, 1991 from Mr. Kosowsky and Mr. Brant demanded the interest payment in February and the $1.3 million payment on principal by March 15, 1991. *See* White Birch Exhibits No. 4 and 5.

The fax from Mr. Kosowsky on February 26, 1991 indicated the interest payment was to be made by February 28, 1991.

Memoranda from Mr. Angotta and Mr. Kosowsky to Mr. Brant indicate the Brant accountants made frequent calls to the Calumet office between January 31 and March 4, 1991 seeking payment of the interest due on the Mogambo purchase note. *See* White Birch Exhibits No. 7 and 8.

The fax from Jean Bickley of White Birch to Calumet on March 7, 1991 was a rebilling of the January 28 and February 12, 1991 billings for interest due on the Mogambo note.

One might infer from this activity that White Birch was expecting only the interest payment. However, the March 15, 1991 extended date for the $1.3 million payment on principal was fast approaching. It is not unreasonable to conclude that White Birch was expecting a payment on principal as well. The extended deadline of March 15, 1991 for payment of the $1.3 million on principal, delinquent since October 31, 1990, was only a week beyond March 8, 1991.

The Calumet telephone logs, Exhibit 12 to Ms. Hollearn's Deposition, 4-24-91, indicate that a 5-minute telephone call was made from the Calumet office to White Birch's Greenwich, Connecticut telephone number at 12:24 p.m. on March 8, 1991.

Ms. Hollearn testified that each telephone in the Calumet office has six lines making it impossible to tell from the logs from which telephone a call was made or who made the call. *See* Hollearn Deposition 4-24-91, pgs. 114, 177-180.

Ms. Hollearn speculated she probably made this call, although she was not sure; she thought someone from White Birch may have called Calumet on March 8th. See Hollearn Deposition, 4-24-91, pgs. 59, 153.

Ms. Hollearn could not recall with whom she spoke on March 8, 1991. She thought it was either Richard Angotta, Carl Staike, or Allen Kosowsky, which she identified as the three people she ordinarily talked to regarding wire transfers. See Hollearn Deposition 4-24-91, pgs. 59-60. She did not remember which of the three she may have spoken to on March 8, 1991.

Mr. Brant, who is engaged in several enterprises, apparently maintains a central accounting office for Brant Industries. The office also keeps the accounting records of White Birch Farm, Inc. Mr. Kosowsky is in charge of the office. Mr. Steike and Mr. Angotta report to Mr. Kosowsky. *See* Kosowsky Deposition, 6-5-91, pgs. 43, 48.

Ms. Hollearn testified she informed the person she spoke to at White Birch that a wire transfer had been sent, of the amount of the transfer, and how she had calculated the amount. *See* Hollearn Deposition 4-24-91, pgs. 59-60.

Mr. Kosowsky denied he was the person who took a call from Ms. Hollearn on March 8, 1991. *See* Kosowsky Deposition, 6-5-91, pgs 52-53.

Mr. Steike testified he did not speak to anyone at Calumet Farm on March 8, 1991 about a wire transfer. *See* Steike Deposition 6-6-91, pgs. 30-32.

Mr. Angotta did not recall speaking to Ms. Hollearn on March 8, 1991 and had no recollection of anything that might

have been said on that date regarding the wire transfer. *See* Angotta Deposition 6-6-91, pgs. 18-20.

Ms. Hollearn was not certain she was the person who made the 5-minute telephone call from Calumet to White Birch at 12:24 on March 8, 1991. She testified it "probably" was her. However, she also testified someone from White Birch may have celled her on that date. *See* Hollearn Deposition 4-24-91, pgs. 53, 153.

Mr. Brant testified he had asked Mr. Kosowsky to bring to Mr. Lundy's attention the exact amount of interest due because Lundy had promised to bring the account current and pay something on the amortization, on the $1.3 million. Brant Deposition 65-91, pgs. 37-54.

Mr. Kosowsky testified that late in the afternoon of March 8, 1991, at his request, Jean Bickley called Calumet and spoke to Ms. Hollearn and was informed the wire transfer had been sent. Ms. Bickley told him Ms. Hollearn did not indicate the amount. Kosowsky Deposition 6-5-91, pgs. 53-58.

The foregoing evidence is insufficient to support a finding by the court that White Birch had notice of the error in the amount of the wire transfer before the amount of the wire transfer was credited to White Birth's account at Citibank on March 8, 1991. Ms. Hollearn was uncertain that she made the call from Calumet to White Birch on March 8, 1991; she was unable to identify the person she spoke to; she acknowledged that someone at White Birch might have called her later in the day. Hollearn Deposition 424-91, pg. 59. This detracts from the credence to be given to her assertion that she told someone at White Birch that a wire transfer had been sent, of the amount of the transfer, and of the offsets made to determine the amount of the transfer. She could not recall the

reaction of the person she spoke to concerning the offsets. The court believes Ms. Hollearn may be confusing conversations she had with White Birch accountants on Monday, March 11, 1991 with a conversation she had with someone, probably with Jean Bickley of White Birch, late in the afternoon on March 8, 1991. Hollearn Deposition, 4-24-91, pgs. 65-66. The $770,301.58 possibly had been credited to White Birch's account at Citibank before this latter conversation occurred.

On Monday, March 11, 1991, Mr. Steike of White Birch called Calumet before 9:00 a.m. and asked to speak to Ms. Hollearn. At that point in time White Birch accountants had not been able to confirm that a wire transfer had been credited to White Birch's account at Citibank. Steike Deposition, 6-6-91, pgs. 32-33.

Ms. Hollearn testified she learned of the mistake in the wire transfer when she arrived at work on Monday, March 11, 1991 and opened an envelope received in the mail from First National containing the confirmation of the wire transfer. Hollearn Exhibit No. 6. The confirmation document indicated $770,301.58 rather than $77,301.58 had been wire transferred from Calumet's account at First National to White Birch's account at Citibank. Hollearn Deposition 4-24-91, pgs. 64--65.

At approximately 9:00 a.m. on March 11, 1991 Ms. Hollearn called First National and again asked to speak to Richard (Dick) Rogers, senior vice president and cashier of the bank. He was not available. At her request the call was transferred to David Roberts, president and CEO of the Bank. She informed Mr. Roberts of the error in the wire transfer. He told her they would get right on it and get back to her; that

they would try to reverse the wire transfer. Hollearn Deposition 4-24-91, pgs. 65-66.

Mr. Roberts apparently was able to converse with Mr. Rogers because Mr. Rogers informed Lori Pettit of the alleged error in the wire transfer. She and Mr. Rogers reviewed the bank records relating to the wire transfer. Rogers Deposition 4-23-91, pgs. 5, 15-44.

Mr. Rogers called to inform Citibank of the error. At approximately 11:00 a.m. he spoke to Lillian Smith and informed her of the error. She said she would have to receive written confirmation over the Fedwire machine before she could do anything.

Commencing at approximately 9:28 a.m. on March 11, 1991, Ms. Pettit and another bank employee, David Devilla, encoded the Fedwire machine in an attempt to reverse the March 8, 1991 wire transfer. Their effort to do so was rejected. They called the Fedwire help line and were able to process a request to Citibank to return the wire-transferred funds. They received a message from Citibank a few days later saying Citibank had rejected the request. Pettit Deposition 4-23-91, pgs. 58-68; Pettit Exhibits No. 3, 4, and 5. Citibank could not return the money because it was already applied to the customer's account. Roberts Deposition 11-10-93, 10g. 42.

Meanwhile, at about 10:00 a.m. on March 11, 1991, Mr. Steike called Calumet and was able to speak to Ms. Hollearn. She informed him a wire transfer had been sent but there was a problem with it. She did not go into detail about the problem. Steike Deposition 6-6-91.

Sometime around 10:00 a.m. on March 11, 1991, Mr. Steike, Mr. Angotta and Mr. Kosowsky were able to confirm that a wire transfer in the amount of $770,301.58 had been credited to White Birch's account at Citibank on March 8, 1991. Steike Exhibit No. 1; Angotta Deposition 6-6-91, pg. 22.

At 10:05 a.m. on March 11, 1991 Mr. Steike gave Citibank instructions to transfer $693,000 from White Birch's account at Citibank to Mr. Brant's account at the bank. The purpose of the transfer was to segregate the alleged excess amount of the wire transfer. White Birch Exhibit No. 10 to Kosowsky Deposition 6-5-91; Steike Deposition 6-6-91, pgs. 39-47.

On March 11, 1991 at 12:53 p.m. Mr. Kosowsky caused to be faxed to Citibank a letter stating that the sender of the wire transfer of $770,301.58 that had been credited to White Birch's account on March 8, 1991 was indebted to White Birch in the amount of $3.9 million plus interest; that the sender had indicated the wire transfer amount was erroneous; that White Birch maintained that the funds were the legal property of White Birch. Kosowsky requested that written approval be obtained from White Birch before any final action be taken with respect to the request of the originating bank for reversal of the wire transfer. White Birch Exhibit No. 9 to Kosowsky Deposition 6-5-91.On March 13, 1991 Ms. Hollearn faxed to Mr. Brant a letter from Mr. Rogers on First National Bank letterhead advising him that an inadvertent error was made in the wire transfer of March 8, 1991; that the correct amount should have been $77,301.58. The letter requested return of $693,000.00 as per First National's request of March 11, 1991 to Citibank. Hollearn Exhibit No. 8. The fax requested that copies of the letter be forwarded to

Citibank and Connecticut Bank & Trust Company. Holleam Deposition 424-91, pgs. 157-159.

On March 13, 1991 Mr. Steike requested that Citibank transfer back to the White Birch account the $693,000.00 that had been transferred to Mr. Brant's account on March 8, 1999. White Birch Exhibit No. 10 to Kosowsky Deposition 6-5-91; Steike Deposition 6-6-91, pgs. 39-47.

Possibly White Birch and Mr. Brant were agreeable to a return of the $693,000.00 if First National would write a letter admitting the error in the wire transfer was made by First National. Roberts Deposition, 11-10-93, pg. 47. First National was unwilling to admit it had made the error with respect to the wire transfer.

The $693,000.00 was not returned to First National. Subsequently Mr. Brant withdrew $750,000.00 from the White Birch account and loaned that amount of money to Brant Publications. Steike Deposition 6-6-91, pgs. 53-65. It should be remembered that White Birch Farm and Mr. Brant jointly were the sellers of Mogambo and both were payees of the $6,500,000.00 Calumet note for the purchase of a one-halt interest in Mogambo.

First National learned on March 27 or 28 of 1991 that the $693,000.00 would not be returned to the bank. Roberts Deposition 11-10-93, pg. 53. During the period between March 11 and March 28, 1991, in the expectation the money would be returned, First National honored checks which overdrew Calumet's bank account. By March 28, 1991 the account was overdrawn by an amount of $201,000.00. Checks in an additional amount in excess of $18,000.00 were outstanding but had not been presented for collection.

On March 27, 1991 Calumet filed the present action in the Scott Circuit Court against First National seeking recovery of the $693,000.00 alleged to have been erroneously transferred to White Birch.

On March 28, 1991 Calumet filed a related action in the Scott Circuit Court against White Birch, Peter M. Brant and Connecticut Bank & Trust Company, N.A. seeking return of the $693,000.00.

On March 28, 1991 First National agreed to make a loan to Calumet in the amount of $500,000.00. The loan was to be secured by a security interest in Calumet's one-half interest in Mogambo, which was represented to be unencumbered. The bank lending officers were aware that a Kentucky tax lien encumbered Calumet's equine interests, but were assured the tax lien would be resolved. As additional security the bank was granted a security interest in Calumet's causes of action against White Birch and Brant.

The loan was closed on March 29, 1991. The proceeds were used to cover checks totaling $201,000.00 the bank had honored on Calumet's overdrawn account.

After Calumet filed its petition for relief under chapter 11 in this court the litigation concerning the erroneous wire transfer followed the debtor to this court in the form of the removed and transferred actions, now designated adversary proceedings, which as previously indicated were consolidated for purposes of trial.

During the course of these adversary proceedings the debtor in possession settled its claims against White Birch and Brant for $75,000.00. Pursuant to the settlement agreement the debtor in possession released White Birch and Brant from

any and all claims of the bankruptcy estate against said defendants.

In a separate opinion this court invalidated as preferential First National's security interests in property of the debtor to the extent such security interests secured the antecedent debt represented by the overdrafts that the bank had honored on Calumet's bank account.

Thereafter, First National entered into a settlement agreement with the debtor in possession. The bank paid the bankruptcy estate $50,000.00 in settlement of the debtor's claim seeking restoration of $693,000.00 to the debtor's bank account. First National released any interest it may have in the bankruptcy estate except as a prepetition general creditor. First National was recognized as holding a prepetition unsecured claim in the amount of $512,405.00, which includes the $500,000.00 loan and prepetition interest. First National waived its right to receive the first $25,000.00 in any dividend on the claim. The debtor in possession waived any claim it had to any recovery First National might obtain from White Birch or Brant. The debtor in possession granted First National a security interest in any claims or causes of action the bankruptcy estate might have against White Birch or Brant. This latter provision was probably meaningless in view of the fact the prior settlement with White Birch and Brant released all claims and causes of action of the bankruptcy estate against said defendants.

Thus, as previously noted, the only unresolved matter in this adversary proceeding is the cross-claim of the defendant First National against White Birch and Brant for restitution.

Apparently, in its appeal in the court of appeals First National has conceded it made the error in the wire transfer.

Such admission may be a predicate to recovery under U.C.C. 4A-303(a) which appears to be applicable only if the receiving bank (First National) issued a payment order in an amount greater than the amount of the sender's (Calumet's) order.

CONCLUSIONS OF LAW

The applicable provision of section 4A of the U.C.C. is as follows:

> Section 4A-303 Erroneous Execution of Payment Order
>
> (a) a receiving bank that (I) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order ... is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution.

As this court reads U.C.C. § 4A-401 and § 4A-.405(1), which is in the disjunctive, both of which sections are complementary to § 4A-301(a), payment on Calumet's indebtedness to White Birch, evidenced by the $6.5 million note for purchase of a one-half interest in the stallion Mogambo, occurred when the wire transferred funds in the amount of $770,301.58 were credited to White Birch's account at Cibitank. The funds were credited to White Birch's account before the close of Citibank's funds-transfer business day on March 8, 1991. At that time the funds were made available to White Birch within the meaning of U.C.C. § 405(1)(C).

The testimony of Calumet employee Angela Hollearn is equivocal as to when she spoke by telephone to someone at White Birch and informed the person she talked to that a wire transfer had been sent, and allegedly of the amount of the transfer, and how the amount was calculated. She could not confirm she was the person who made a call to White Birch at 12:24 p.m. on March 8, 1991. The court believes she more likely spoke to Ms. Jean Bickley of White Birch when Ms. Bickley called Calumet late in the afternoon on March 8, 1991, which may have been after the wired funds were credited to White Birch's account at Citibank. We do not have any testimony of Ms. Bickley concerning what she was told by Ms. Hollearn during this telephone call. The court is simply unable to find that White Birch knew of the error in the amount of the wire transfer before the funds were credited to its account at Citibank.

The court has found that White Birch did not engage in any conduct that caused the error in the wire transfer. The court is not persuaded that White Birch acted in bad faith in retaining all of the wire transferred funds in view of the fact Calumet was several months delinquent in payment of principal and interest due on the Mogambo note.

Clearly, White Birch was apprised of the error on Monday, March 11, 1991, the next business day after the wire transfer was effectuated.

First National argues the discharge-for-value rule is unavailable to White Birch as a defense because White Birch was apprised on March 11, 1991 of the error in the wire transfer, which was before White Birch made an accounting entry on its books crediting the $693,000.00 excess amount of the wire transfer as a payment on principal due on the Mogambo note.

The court cannot accept the argument that the applicability of the discharge-for-value rule as a defense is subject to the vagaries of the in-house accounting practices of the beneficiary of a wire transfer. This would indeed amount to pouring molasses on the Fedwire system. The court believes the better rule is that notice of the mistake must have been received before the funds are credited to the beneficiaries account in apparent payment of a debt. *General Electric Capital Corp. v. Central Bank,* 49 F.3rd 280, 284 (7th Cir. 1995); 3 *White & Summers* § 25-1, pgs 93-94.

First National appears to have reduced the amount of its restitution claim against White Birch from $693,000.00, the excess amount of the wire transfer, to $550,000.00. The latter amount is composed of the $500,000.00 First National loaned to Calumet on March 29, 1991 after it became evident White Birch could not return the $693,000.00 excess amount of the wire transfer. The additional $50,000.00 represents the amount First National paid to Calumet in settlement of Calumet's claim against First National in this adversary proceeding seeking restoration of the excess amount of the wire transfer to Calumet's bank account.

While First Nationals decision to honor Calumet's checks that overdrew the debtor's bank account to the extent of $201,000.00 might have been tantamount to restoration of that amount of the erroneously transferred funds to Calumet's checking account, this was no longer true once First National repaid itself for the overdrafts from the proceeds of the $500,000.00 loan.

The court is not persuaded that the $500,000.00 loan which was structured as secured by a security interest in Calumet's one-half interest in the stallion Mogambo and a purported security interest in Calumet's causes of action

against White Birch and Brant qualifies as restitution of that amount to Calumet's bank account at First National. The loan became unsecured only by reason of the fact Calumet's one-half interest in Mogambo was subject to a prior tax lien filed by the state of Kentucky. This court's opinion and order of September 15, 1994 held the bank's security interest was avoidable as a preference to the extent the bank had paid itself on an antecedent debt represented by the amount the bank had honored checks overdrawing the debtor's bank account. Under title 11 U.S.C. § 502(d), the bank would not have been entitled to a dividend on the agreed amount of its $512,405.00 unsecured claim until it repaid the $201,405.00 to the bankruptcy estate, except for the settlement agreement. The loan documents and the settlement agreement do not characterize the loan as a restitution payment.

The $50,000.00 paid pursuant to the settlement agreement was paid to the debtor in possession, a separate entity from Calumet; it was paid to the bankruptcy estate well after the debtor's farm and equine collateral had been sold to third parties and the debtor was no longer a going concern. It was not a restoration of funds to the debtor's bank account before bankruptcy ensued.

Accordingly, the court is of the opinion the motion of White Birch, including Brant, for summary judgment should be sustained, and the cross-claim of First National for summary judgment against White Birch and Brant should be dismissed.

Dated this 25th day of April 2002

By the court–

/s/ Joe Lee
JOE LEE U.S. BANKRUPTCY JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95-5953

[Filed, May 14, 1997]

In re: CALUMET FARM, INC., Debtor.	)
FIRST NATIONAL BANK & TRUST COMPANY, Plaintiff-Appellant,	)
v.	)
PETER M. BRANT AND WHITE BIRCH FARM, INC., Defendants-Appellees.	)

OPINION

PER CURIAM. From consolidated adversary proceedings in the bankruptcy court, the plaintiff appeals the district court's affirmance of: (1) the bankruptcy court's grant of summary judgment in favor of defendants; and (2) the

bankruptcy court's denial of First National's motion for leave to amend its counterclaim. For the reasons that follow, we REVERSE the grant of summary judgment in favor of the defendants; AFFIRM the denial of the plaintiff's motion for leave to amend its counterclaim; and REMAND the case for further proceedings.

I.

This case arose out of a wire transfer of $770,301.58 from the bankruptcy debtor, Calumet Farm, Inc. ("Calumet"), to Defendants-Appellees Peter M. Brant and White Birch Farm, Inc. (collectively, " White Birch") on March 8, 1991. Calumet initiated the wire transfer by a payment order to its bank, Plaintiff-Appellant First National Bank and Trust Company ("First National"), and effected the transfer through Fedwire, the Federal Reserve's wire transfer system.

White Birch is a thoroughbred horse farm in Connecticut owned by Peter Brant. In 1986, Calumet purchased a one-half interest in the thoroughbred stallion Mogambo from White Birch and executed a $6,500,000 promissory note ("the Mogambo note") evidencing the obligation. On October 31, 1990, Calumet defaulted in making its annual principal payment of $ 1,3000,000 on the debt. Brant and J.T. Lundy, president of Calumet, reached an agreement whereby Calumet would make the payment on or before March 15, 1991. Calumet also defaulted in making several intervening interest payments and, as of March 7, 1991, owed White Birch approximately $ 103,057.50 in interest and penalties.

On March 8, 1991, Lundy instructed Calumet's bookkeeper. Angela Holleran, to pay the interest due to White Birch as of January 31, 1991, amounting to $77,301.58. Holleran thereupon called First National to arrange payment

by wire transfer, and also called White Birch to inform it that a wire transfer payment was forthcoming; however, the substance of these conversations is disputed as to the amount that White Birch was to receive. The wire transfer, referenced as "MOGAMBO INT," was made to White Birch's account at Citibank in New York on March 8, 1991.

On March 11, 1991, Holleran received written confirmation of the wire transfer from First National and realized that $770,301.58, rather than $77,301.58, had been transferred. Holleran notified First National of the mistake and First National contacted Citibank to request reversal of the wire transfer. Because the money already had been credited to White Birch's account, Citibank refused to reverse the wire transfer. Thereafter, First National requested that Brant return the additional $ 693,000 erroneously transferred to him, but Brant refused to return the money unless First National acknowledged in writing that it had made the error in transferring the funds.

On March 27, 1991, Calumet filed suit against First National in Scott County Circuit Court alleging negligence and breach of contract with respect to the mistaken wire transfer. Because of Calumet's precarious financial condition, Calumet and First National reached a partial settlement whereby First National agreed to lend Calumet $500,000, secured by Calumet's interest in the Mogambo note. Calumet also assigned to First National any right of recovery that it might possess against White Birch and agreed to release First National from any liability arising from the wire transfer. Although First National and Calumet had partially settled the state court action, First National filed an answer and counterclaim on April 4, 1991, asserting claims against White Birch. In the meantime, White Birch filed a complaint against Calumet in the United States District Court for the Eastern

District of Kentucky, seeking the principal and interest due on the Mogambo note.

On June 11, 1991, Calumet filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Kentucky. In October 1991, the state court actions were removed to the Bankruptcy Court as adversary proceedings, and on December 12, 1991, the district court action was referred to the bankruptcy court.

Upon cross-motions for summary judgment, the bankruptcy court entered partial summary judgment in favor of White Birch on December 22, 1993. The court held that First National lacked standing to assert a restitution claim against White Birch, reasoning that the amount of a wire transfer, once debited from a depositor's account, belongs solely to that depositor; accordingly, the court held that only Calumet possessed standing to recover the transferred funds from White Birch. However, because Calumet owed White Birch a sum well in excess of the amount of the wire transfer, the court held that White Birch had not been unjustly enriched and was not obligated to make restitution. The court then denied First National leave to file a second amended counterclaim to include claims for conversion and intentional interference with a contract, but allowed First National to assert other state-law claims.

On September 6, 1994, the bankruptcy court entered summary judgment in favor of White Birch on all remaining claims and entered its final order on October 27, 1994. First National appealed the bankruptcy court's grant of summary judgment in favor of White Birch and the court's denial of leave to amend its counterclaim. The district court affirmed the bankruptcy court's decision in its entirety on June 13, 1995.

First National has timely appealed the decision of the district court.

II.

This court reviews a district court's grant of summary judgment de novo, using the same standard employed by the district court. *City Mgmt. Corp. v. United States Chem. Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994); *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339 (6th Cir. 1993); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding upon a motion for summary judgment, we must review the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

We review a lower court's denial of a motion for leave to amend the pleadings for an abuse of discretion. *See Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041 (6th Cir. 1991).

III.

First National argues that the district court erred in affirming the bankruptcy court's grant of summary judgment in favor of White Birch, based on First National's lack of standing. Specifically, First National contends that it possessed standing to seek restitution of the funds from White

Birch pursuant to Article 4A of the Uniform Commercial Code. We agree.

Pursuant to Uniform Commercial Code ("U.C.C.") § 4A-303(a) (1991),[2] a bank that erroneously executes a payment order for an amount greater than that requested by the sender is entitled to recover the excess funds from the recipient in an action for restitution. Specifically, Article 4A provides:

> A receiving bank that (1) executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order . . . is entitled to payment of the amount of the sender's order under Section 4A-402(c) if that subsection is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received *to the extent allowed by the law governing mistake and restitution*.

U.C.C. § 4A-303 (emphasis added). In order to bring an action for restitution, an individual must demonstrate that money was paid to another by mistake and that the recipient would be unjustly enriched, to the payor's detriment, if he were allowed to keep it. *See Restatement of Restitution* § 1

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[2] Kentucky did not adopt Article 4A of the Uniform Commercial Code until 1992, more than one year after the wire transfer in the present case had been made. *See* Ky. Rev. St. Ann. § 355.4A-303(a)(enacting the provisions of U.C.C. § 4A-303(a)). However, the bankruptcy and district court held, and the parties agree, that the provisions of U.C.C. § 4A-303(a) apply to the wire transfer in this case because it was effected by use of Fedwire, the Federal Reserve's wire transfer system. *See* 12 C.F.R. § 210.25-32 (applying Article 4A of the Uniform Commercial Code to all wire transfers effected through the use of Fedwire).

(1937)("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

In the present case, the bankruptcy and district courts erred in holding that First National lacked standing to maintain a restitution action for the funds erroneously transferred to White Birch's account. Both the bankruptcy and district courts held that the excess funds properly belonged to Calumet once the bank debited Calumet's account and executed the wire transfer to White Birch. According to the bankruptcy and district courts, only Calumet could maintain a restitution action once the funds had been withdrawn from its account. In so holding, however, the bankruptcy and district courts failed to cite any authority; moreover, that holding is inconsistent with both the Uniform Commercial Code and the Kentucky Revised Statutes, because it would effectively eliminate the ability of any bank to seek restitution for the erroneous execution of a payment order. *See* U.C.C. § 4A-303(a); Ky. Rev. St. Ann. § 355.4A-303(1)(a) (enacting the provisions of U.C.C. § 4A-303(a)); *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. Sanati*, 11 Cal. App. 4th 1079, 14 Cal. Rptr. 2d 615, 619 n.4 (Cal. Ct. App. 1992) (construing California's enactment of U.C.C. § 4A-303(a)). Because U.C.C. § 4A-303(a) expressly allows a receiving bank to recover from the beneficiary of an erroneous wire transfer, the bankruptcy and district courts erred in holding that First National lacked standing to assert its restitution claim.

Although we believe that the bankruptcy and district courts erred as a matter of law in holding that First National lacked standing to assert a restitution claim against White Birch, we may affirm the judgment of a lower court on grounds other than those relied upon by that court. *See In re Walter*, 45 F.3d 1023, 1034 (6th Cir. 1995) (citing *Hilliard*

v. United States Postal Serv., 814 F.2d 325, 326 (6th Cir. 1987)). Accordingly, we must consider whether the district court's grant of summary judgment was appropriate on other grounds.

IV.

White Birch argues that, even if First National possessed standing to assert its restitution claim, this court should affirm the grant of summary judgment because First National cannot prevail on that claim. Specifically, White Birch notes that, although a restitution action typically allows recovery of overpaid amounts, certain defenses are available that allow the recipient of an errant transfer to keep the money erroneously transferred to it. Because genuine issues of materials fact still exist, however, this court cannot determine the applicability of the defenses asserted by White Birch and must remand the case for additional findings of fact.

As the parties have noted, two alternative defenses are available to a claim of restitution that would permit a recipient of funds to keep funds mistakenly transferred to it: (1) the "discharge for value" rule; and (2) the "mistake of fact" rule. The parties dispute which is applicable to the present case. Under the discharge-for-value rule, a creditor who receives funds from a transferor in discharge of another's debt need not make restitution for the sums received, even though "the discharge was given by mistake of the transferor as to his interests or duties . . ."; however, this rule will only permit the transferee to keep the funds if it "made no misrepresentation and did not have notice of the transferor's mistake." *Restatement of Restitution* § 14(1) (1937); *see Union Cent. Life Ins. Co. v. Glasscock*, 270 Ky. 750, 110 S.W.2d 681, 686 (Ky. 1937) (relying on *Restatement of Restitution* § 14(1)); *see also Sanati*, 14 Cal. Rptr. 2d at 619-

21. Conversely, the "mistake of fact" rule allows a creditor to keep the amount erroneously transferred to it only if he has detrimentally relied on the payment by changing his position toward his debtor. *See German Sec. Bank v. Columbia Fin. & Trust Co.*, 27 Ky. L. Rep. 581, 85 S.W. 761, 763 (Ky. 1905); *see also Jefferson County Bank v. Hansen Lumber Co.*, 246 Ky. 384, 55 S.W.2d 54, 59 (Ky. 1932); *French Bank of California v. First Nat'l Bank of Louisville*, 585 S.W.2d 431, 432 (Ky. Ct. App. 1979); *see generally* James J. White & Robert S. Summers, *Uniform Commercial Code* § 25-1 at 92-94 (4th ed. 1995). First National observes that Kentucky courts have never explicitly recognized the discharge-for-value rule as a viable defense to a restitution claim and urges us to apply the mistake-of-fact rule.

However, White Birch correctly notes that U.C.C. § 4A-303(a), applicable to the wire transfer in this case because it was effected through the use of the Federal Reserve's wire transfer system, incorporates the provisions of the discharge-for-value defense and allows its assertion in the present case. *Compare* U.C.C. § 4A-303(a) cmt. 2 *with Restatement of Restitution* § 14(1) (1937);[3] *see Banque Worms v.*

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[3] Section 14(1) of the *Restatement of Restitution*, entitled "Discharge for Value," states:

> A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

Restatement of Restitution § 14(1) (1937).

Bankamerica Int'l, 77 N.Y.2d 362, 570 N.E.2d 189, 197, 568 N.Y.S.2d 541 (N.Y. 1991) ("It seems clear from . . . article 4A and the Official Comments that the drafters of UCC article 4A contemplated that the 'discharge for value' rule could appropriately be applied in respect to electronic fund transfers . . . ."), *cited with approval in General Elec. Capital Corp. v. Central Bank*, 49 F.3d 280, 284-86 (7th Cir. 1995) (holding that the discharge-for-value rule applies to wire transfers covered by U.C.C. § 4A-303(a) and its official comments). Thus, even though Kentucky courts might apply the mistake-of-fact rule in other contexts, a wire transfer effected via Fedwire is covered by the provisions of U.C.C. § 4A-303(a) and its official commentary, and is therefore subject to the discharge-for-value rule. *See Central Bank*, 49 F.3d at 284-86 (noting that, although Wisconsin had always adhered to the mistake-of-fact doctrine of restitution, its

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Comment 2 to U.C.C. § 4A-303(a) provides an illustration of the "discharge for value" rule, tracing the statute's implications for an originator who wishes to send only $1,000,000, yet whose bank mistakenly transfers $2,000,000:

> Originator's Bank would normally have a right to recover the overpayment from Beneficiary, but in unusual cases the law of restitution might allow Beneficiary to keep all or part of the overpayment. For example, if Originator owed $2,000,000 to Beneficiary and Beneficiary received the extra $1,000,000 in good faith in discharge of the debt, Beneficiary may be allowed to keep it. In this case Originator's Bank has paid an obligation of Originator and under the law of restitution, which applies through Section 1-103, Originator's Bank would be subrogated to Beneficiary's rights against Originator on the obligation paid by Originator's Bank.

U.C.C. § 4A-303(a) cmt. 2.

enactment of U.C.C. § 4A-303(a) and its commentary indicated its adoption of the discharge-for-value rule for electronic funds transfers); *Banque Worms*, 570 N.E.2d at 197 (holding that, although New York courts had applied the mistake-of-fact rule in other contexts, the state legislature's enactment of U.C.C. § 4A-303(a) required application of the discharge-for-value rule to the wire transfers at issue).

Although we hold that the discharge-for-value rule is available as a defense to a restitution claim under U.C.C. § 4A-303(a) and its commentary, we cannot determine the applicability of that defense in the present case because genuine issues of material fact remain for resolution by the bankruptcy court. Upon remand, the bankruptcy court should make additional findings as to whether White Birch had notice that the funds transfer had been made in error and, thus, determine whether White Birch may successfully assert that defense to First National's restitution claim.

V.

First National next contends that the district court erred in affirming the bankruptcy court's denial of its motion for leave to amend its counterclaim. Specifically, First National claims that the bankruptcy court abused its discretion by not allowing First National to add claims against White Birch for conversion and for intentional interference with a contract. However, these alternative claims rest on the same set of operative facts that will determine the outcome of First National's restitution claim; thus, their inclusion in First National's counterclaim could not substantively affect the resolution of the case. The bankruptcy court therefore did not abuse its broad discretion by denying leave to amend, and the district court did not err in affirming that decision.

First National could not prevail on a claim for conversion if its restitution claim fails because a conversion claim involves the "wrongful exercise of dominion and control over property of another." *State Auto Mut. Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d 626, 627 (Ky. Ct. App. 1990). If First National's restitution claim fails, White Birch's exercise of dominion and control over the money would not be wrongful; rather, such exercise of control would be consistent with White Birch's right to apply the funds to satisfy Calumet's debt under the Mogambo note. *See id.*

Similarly, if First National's restitution claim fails, it could not prevail against White Birch on a claim for intentional interference with its contractual relationship with Calumet. *See Restatement (Second) of Torts* § 766A (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him."). First National claims that White Birch's retention of the erroneously transferred funds "improperly interfered" with First National's contractual obligation to recredit Calumet's account and "forced First National to enter settlement with Calumet." As the district court noted, however. White Birch was "in no way responsible" for the erroneous wire transfer or First National's decision to loan Calumet money after the wire transfer had occurred. Furthermore, if First National's restitution claim ultimately fails, White Birch would be lawfully permitted to retain the wire transfer it received. In that case, White Birch could not be held liable for having failed to return funds that it was lawfully permitted to keep.

Because First National cannot prevail on claims for conversion and intentional interference with a contract if its restitution claim fails, inclusion of the additional claims would produce no substantive difference in the outcome of the case. Further, the bankruptcy court has broad discretion in determining whether to allow a party to amend a pleading. Accordingly, the bankruptcy court did not abuse its discretion by denying leave to amend, and the district court properly affirmed that decision.

VI.

We hereby REVERSE the grant of summary judgment in favor of White Birch; AFFIRM the denial of First National's motion for leave to amend its counterclaim; and REMAND the case to the district court. Upon remand, the district court is instructed to remand the case to the bankruptcy court for further proceedings consistent with this opinion.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 94-526

[Filed, June 13, 1995]

In re: CALUMET FARM, Inc., Debtor.	)
FIRST NATIONAL BANK & TRUST COMPANY, Appellant,	)
v.	)
PETER M. BRANT and WHITE BIRCH FARM, INC., Appellees.	)

OPINION AND ORDER

The appellant, First National Bank & Trust Company ("First National"), seeks to appeal the following orders of the bankruptcy court:

(1) the order of December 22, 1993, granting summary judgment to Peter M. Brant ('Brant") and White Birch Farm, Inc. ("White Birch") (sometimes collectively known as White Birch) with respect to First National's claim based on unjust enrichment and restitution;

(2) the order of December 22, 1993, denying First National's motion for leave to file second amended counterclaim with respect to its claim based on conversion;

(3) the order of December 22, 1993, denying First National's motion for leave to file second amended counterclaim with respect to its claim based on intentional interference with contractual relations;

(4) the orders of September 6, 1994 and October 17, 1994, granting summary judgment to Brant and White Birch with respect to First National's claims based on intentional deprivation of a legally protected property interest and intentional infliction of injury; and

(5) the final order of October 27, 1994, dismissing First National's claim based on indemnification.

This motion is fully briefed and ripe for review.

I. FACTS

This appeal arises out of a wire transfer received by White Birch in its account at Citibank in New York City on March 8, 1991, from Calumet Farm, Inc. (Calumet") and the events that followed the wire transfer. As a result of the wire transfer, three separate adversary proceedings were filed and

later consolidated. Two of the adversary proceedings involve the attempt by Calumet and First National to recover a portion of the wire transfer from White Birch. The third adversary proceeding resulted from White Birch's action to recover a debt due from Calumet under a promissory note given to White Birch.

White Birch is a thoroughbred horse farm in Connecticut that is owned entirely by Brant. Brant frequently conducted business with Calumet and its president, J. T. Lundy. In 1986, Calumet purchased an undivided 0he-half interest in the thoroughbred stallion MOGAMBO from White Birch for the purchase price of $6,500,000.00. White Birch then pledged the MOGAMBO note as collateral on a $6,600,000.00 note in favor of Connecticut Bank and Trust Company ("CBT"), the proceeds from which Brant used to buy ALYDAR brooding rights from Calumet. The two notes were structured as "back to back" transactions, whereby the due dates for White Birch's interest and principal payments to CBT coincided with the due dates for Calumet's payments to White Birch.

On October 31, 1990, Calumet defaulted in making its annual principal payment of $1,300,000.00. Brant and Lundy reached an agreement whereby Calumet would make the payment on or before March 15, 1991. Calumet also defaulted in making several interest payments, and as of March 7, 1991, Calumet owed White Birch $103,057.50 in interest and penalties.

On March 8, 1991, Lundy instructed Calumet's bookkeeper, Angela Holleran, to pay the interest due to White Birch as of January 31, 1991. Pursuant to customary procedure, the amount White Birch owed Calumet for board bills, breeding rights and the like was deducted, and Holleran

determined that the amount of interest due White Birch was $77,301.58. Lundy instructed Holleran to wire transfer that amount to White Birch.

At 11:46 a.m. on March 8, 1991, Holleran telephoned First National, at which Calumet maintained its primary operating account. Holleran spoke with Lori Pettit of First National and requested that a wire transfer be sent to White Birch's account at Citibank in New York and that the transfer be referenced "MOGAMBO Interest Payment." The substance of the conversation, particularly with respect to the amount actually directed to be transferred, is disputed.

At 12:42 p.m., Holleran telephoned White Birch and told one of its employees that Calumet had wire transferred $77,301.58 to White Birth's account at Citibank as an interest payment. At 1:17 p.m., Pettit wire transferred $770,301.58 with the reference "MOGAMBO INT" to White Birth's account at Citibank. At the time of the transfer, Calumet had sufficient funds in its account at First National to cover the entire $770,301.58 wire transfer.

On March 11, 1991, Holleran received written confirmation of the wire transfer from First National and realized that $770,301.58, instead of $77,301.58, had been transferred. Holleran notified First National. who contacted Citibank and requested that the wire transfer be reversed. Because the money had already been credited to White Birch's account, Citibank refused to reverse the wire transfer. Upon learning that $770,301.58 had been transferred to White Birch's account, Brant instructed Allen Kosowsky, White Birch's vice-president of operations and finance, to transfer the excess money, $693,000.00, to Brant's personal account at Citibank. Thereafter, numerous discussions between Calumet, White Birch and First National took place. First

National requested that Brant return $693,000.00 of the wire transfer. Brant refused to return the money unless First National acknowledged in writing that it had made the error in the wire transfer. First National refused.

On March 27, 1991, Calumet filed suit against First National in Scott County Circuit Court, alleging negligence and breach of contract with respect to the wire transfer mistake. Because of Calumet's precarious financial condition, Calumet and First National reached a temporary and partial settlement of the matter. First National agreed to loan Calumet $500,000.00, and took a security interest in the MOGAMBO note and any right of recovery Calumet had against Brant and White Birch. Calumet agreed to waive and release First National "for and relating to incidental damages, consequential damages, lost profits and/or opportunities and/or similar matters" arising from the wire transfer.

Thereafter, on June 11, 1991, Calumet filed for bankruptcy. In an adversary proceeding, Calumet asserted various claims against Brant, White Birch and First National. Additionally, First National asserted six claims against Brant and White Birch. It is from the bankruptcy court's disposition of First National's six claims against Brant and White Birch that First National now appeals.

II. STANDARD OF REVIEW

Pursuant to Bankruptcy Rule 8013,

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings ....

Fed. R. Bankr. P. 8013. In reviewing a bankruptcy court's orders, the district court functions as an appellate court, applying the standards of review normally applied by federal appellate *courts. In re H.J. Scheirich Co.*, 982 F.2d 945 (6th Cir. 1993). Thus, the applicable standard of review for file bankruptcy court s summary judgment decisions is the *de novo* standard. *Blainey v. American S.S. Co.*, 990 F.2d 885, 889 (6th Cir. 1993); *Middleton v. Reynolds Metal* Co., 963 F.2d 881, 882 (6th Cir. 1992). The *de novo* standard applies to all aspects of the bankruptcy court's summary judgment decisions, including findings that no genuine issue of material fact exists. *See Municipal Securities v. Insurance Co. of North America,* 829 F.2d 7, 9 (6th Cir. 1987). Applying the *de novo* standard, the Court must draw all reasonable inferences in favor of the party opposing summary judgment below. *See Blainey,* 990 F.2d at 889.

The applicable standard of review for the bankruptcy court's denial of First National's motions for leave to amend is an "abuse of discretion" standard. *See Zenith Radio Corp. v. Hazeline Research,* 401 U.S. 321, *reh. denied,* 401 U.S. 1015 (1971); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041 (6th Cir. 1991). An abuse of discretion is said to have occurred if the decision to deny the motion to amend is based solely on an error of law. *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994); *Martin v. Associated Truck Ones, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986).

III. ANALYSIS

First National asserts several different theories of recovery in an effort to recoup its losses sustained as a result of the wire transfer error. These theories, and the bankruptcy court's disposition of each, will be examined separately.

A. UNJUST ENRICHMENT AND RESTITUTION

First National first seeks to appeal the bankruptcy court's order of December 22, 1993, granting summary judgment to Brant and White Birch with respect to First National's claim based on unjust enrichment and restitution. The Court reviews this order of the bankruptcy court under a *de novo* standard.

In Kentucky, the rule on unjust enrichment is stated as follows:

> [When money is paid by mistake, although there was negligence on the part of the person making the payment, it may be recovered back for the reason that otherwise the person receiving the money would be enriched at the expense of the other. But this rule is subject to the exception that the payment cannot be recalled when the position of the person to whom the payment was made has been changed to his prejudice toward his debtor in .consequence of the payment; and in such case the person making the payment, and not the person receiving it without fault, must bear the loss.

German Security Bank v. Columbia Finance & Trust Co., 85 S.W.2d 761,763 (Ky. 1905). In its claim for restitution based on unjust enrichment, First National argues that $693,000.00 was paid to White Birch by mistake. Because Brant and White Birch were informed of the mistake immediately, First National argues that they could not have relied on the mistaken payment in any way to their detriment. On the other hand, Brant and White Birch argue that because Calumet owed White Birch over $3,900,000.00 on the MOGAMBO note at the time of the wire transfer, they were not unjustly enriched by retaining the entire amount of the wire transfer.

The bankruptcy court granted Brant and White Birch's motion for summary judgment on First National's unjust enrichment and restitution claim on the grounds of standing. According to the bankruptcy court, the excess money that was erroneously wire transferred to Brant and White Birch was Calumet's, not First National's. In Kentucky, the relationship between a depositor and a bank is a debtor-creditor relationship and the money deposited in the bank becomes the property of the bank. *Keyes v. Paducah & Ill. R.R. Co.*, 61 F.2d 611, 612 (6th Cir. 1932); *Scoggin v. Dillon,* 252 S.W.2d 35, 37 (Ky. 1952); *Pursiful v. First State Bank of Pineville,* 65 S.W.2d 462, 464 (Ky. 1933). However, this relationship ends once a demand is made and the funds are drawn out of the account at the depositor's request. *See* KRS 355.4A-403, -406. Based upon a *de novo* review of the record, the Court agrees that the excess money erroneously paid to White Birch was Calumet's, not First National's. Therefore, First National has no standing to assert a claim for restitution, and the bankruptcy court correctly awarded summary judgment to Brant and White Birch on First National's claim based on unjust enrichment and restitution.

B. CONVERSION

The second order of the bankruptcy court which First National appeals is the order of December 22, 1993, denying First National's motion to amend its counterclaim to include a claim for conversion. The Court reviews this order of the bankruptcy court under an abuse of discretion standard.

First National's motion to amend its counterclaim included four proposed claims -conversion, intentional interference with contractual relations, intentional deprivation of a legally protected property interest, and intentional infliction of injury. Brant and White Birch opposed First National's proposed

amendment on two grounds: (1) that the claims could not withstand a motion to dismiss, thus making any amendment futile; and (2) that it was too late to amend. The bankruptcy court allowed First National to amend its counterclaim with respect to its claims for intentional deprivation of a legally protected property interest and intentional infliction of injury, but denied the motion for leave to amend with respect to First National's claims for conversion and intentional interference with contractual relations. Although it is not clear from the order, it appears that the bankruptcy court did not base its refusal to allow First National to amend its counterclaim to include claims of conversion and intentional interference with contractual relations on the ground that it was too late to amend since it granted First National's motion to amend its counterclaim in part. Thus, it appears that the bankruptcy court's order was based on the fact that it would be futile to amend the counterclaim to add the claims of conversion and intentional interference with contractual relations

Apparently, the bankruptcy court determined that First National's claim for conversion would be futile because of its previous finding that the money erroneously transferred to White Birch belonged to Calumet, not First National. Conversion involves the "wrongful exercise of dominion and control over the property of another." *State Auto Mut. Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d 626, 627 (Ky. App. 1990); *accord Kimberly & European* Diamonds, *Inc. v. Burbank,* 684 F.2d 363, 365-66 (6th Cir. 1982). Because the excess money which was erroneously tra ferred to White Birch did not belong to First National, the Court agrees with the bankruptcy court that First National has no action for conversion. Therefore, the Court finds that the bankruptcy court did not abuse its discretion by refusing to allow First National to amend its counterclaim to add a claim for conversion.

C. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

The third order of the bankruptcy court which First National appeals is the order of December 22, 1993, denying First National's motion tbr leave to amend its counterclaim to include a claim for intentional interference with contractual relations. The Court reviews this decision of the bankruptcy court under an abuse of discretion standard.

Just as with First National's proposed conversion claim, the bankruptcy court appears to have refused to allow First National to amend its counterclaim to include a claim for intentional interference with contractual relations based on the fact that such an amendment would be futile. First National's proposed intentional interference with contractual relations claim was based on Section 766A of the Restatement (Second) of Torts, which provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability m the other for the pecuniary loss resulting to him.

In support of this claim, First National contends that because Brant and White Birch refused to return the excess money, it was faced with a situation which required immediate action in order to prevent potentially catastrophic consequences. Consequently, First National claims that it loaned Calumet $500,000.00 to pay off the overdrafts and to otherwise keep the farm operational. Because of Calumet's bankruptcy, that money is now unrecoverable. First National argues that the

conduct of Brant and White Birch caused its losses. Furthermore, First National claims that there is sufficient evidence to create a factual question that their alleged interference was intentional and improper.

However, Brant and White Birch were in no way responsible for the erroneous wire transfer. They were not involved in First National's decision to loan Calumet money. Furthermore, Brant and White Birch were justified in retaining the funds in order to satisfy the pre-existing indebtedness owed by Calumet. Therefore, the Court finds that the bankruptcy court did not abuse its discretion in denying First National's motion to amend its counterclaim to include a claim for interference with contractual relations.

D. INTENTIONAL DEPRIVATION OF A LEGALLY PROTECTED PROPERTY INTEREST AND INTENTIONAL INFLICTION OF INJURY

First National seeks to appeal the bankruptcy court's order of September 6, 1994, granting summary judgment to Brant and White Birch with respect to First National's claims based on intentional deprivation of a legally protected property interest and intentional infliction of injury, as well as the bankruptcy court's order of October 17, 1994, denying First National's motion to alter or amend the order of September 6, 1994. The Court reviews these orders of the bankruptcy court under the *de novo* standard.

First National's claim for intentional deprivation of a legally protected property interest is based on Section 870 of the Restatement (Second) of Torts, which provides:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his

> conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

Likewise, First National's claim for intentional infliction of injury is based on Section 871 of the Restatement (Second) of Torts, which provides:

> One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

Although the bankruptcy court allowed First National to amend its counterclaim to include these claims, it later granted summary judgment to Brant and White Birch on these claims on two grounds: (1) that the claims were preempted by Federal Reserve Regulation J (12 C.F.R. § 210.25-.32) ("Reg. J"); and (2) that there was no evidence of intent on Brant and White Birch's part.

All Fed Wire transfers, including the wire transfer at issue in this appeal, are governed by Reg. J, a federal law designed to provide the sole statutory scheme for governing fund transfers through the Fed Wire System. Reg. J adopts Article 4A of the Uniform Commercial Code for governing the transfers through Fed Wire. 12 C.F.R. § 210, *et seq.* Common law claims inconsistent with Article 4A are specifically preempted by Reg. J. See 12 C.F.R. § 210.25(a) Appendix A to Subpart B; *see also, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), *reh. denied,* 465 U.S. 1074. As stated in the Official Comment to U.C.C. Article 4A-102, the provisions of Article 4A

> ... are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.

Therefore, First National's claims for intentional deprivation of a legally protected property interest and intentional infliction of injury are preempted by Reg. J.

Even if First National's common law claims were not preempted by Reg. J, the bankruptcy court was correct in dismissing them because there was no evidence of intent on the part of Brant or White Birch. As stated earlier, Brant and White Birch were justified in keeping the entire amount of the transfer to satisfy a very large pre-existing indebtedness which Calumet owed. There was no malicious intent on the part of Brant or White Birch to deprive First National of a legally protected property interest or to inflict injury upon First National. Based upon a *de novo* review, the Court agrees that First National's claims are preempted by Reg. J, and that there is no evidence of intent on the part of Brant or White Birch. Therefore, the bankruptcy court correctly granted summary judgment to Brant and White Birch on First National's claims for intentional interference with a legally protected property interest and for intentional infliction of injury.

E. INDEMNIFICATION

Finally, First National seeks To appeal the bankruptcy court's final order of October 27, 1994, dismissing First

National's claim based on indemnification. The Court reviews this order of the bankruptcy court under a *de novo* standard.

In order to prevail on a claim for indemnity, a party must show (1) that the claimant has paid damages to a third party; (2) that the claimant was legally compelled to do so, or did so as a good faith settlement; and (3) that claimant's liability arose from the more culpable acts or omissions of the defendant. First National argues that Brant and White Birch's refusal to return the mistaken wire transfer compelled First National to negotiate the settlement with Calumet. However, Brant and White Birch did not cause, initiate, or contribute to the allegedly mistaken transfer, nor were they involved with First National's decision to enter into the settlement with Calumet. Therefore, based on a *de novo* review, the bankruptcy court was correct in dismissing First National's claim based on indemnification.

IV. CONCLUSION

Accordingly, the Court hereby ORDERS that:

(1) the bankruptcy court's order of December 22, 1993, granting summary judgment to Brant and White Birch Farm with respect to First National's claims based on unjust enrichment and restitution is AFFIRMED;

(2) the bankruptcy court's order of December 22, 1993, denying First National's motion for leave to file second amended counterclaim with respect to its claim based on conversion is AFFIRMED;

(3) the bankruptcy court's order of December 22, 1993, denying First National's motion for leave to file second amended counterclaim with respect to its claim based on

intentional interference with contractual relations is AFFIRMED;

(4) the bankruptcy court's orders of September 6, 1994 and October 17, 1994 granting summary judgment to Brant and White Birch with respect to First National's claims based on intentional deprivation of a legally protected property interest and intentional infliction of injury are AFFIRMED;

(5) the bankruptcy court's final order of October27, 1994, dismissing First National's claim based on indemnification is AFFIRMED: and

(6) this matter is STRICKEN from the active docket.

On this 12th day of June, 1995.

KARL S. FORESTER, JUDGE

APPENDIX G

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 91-5203 (CONSOLIDATED)

[Filed, December 22, 1993]

IN RE:	)
CALUMET FARM, INC.	)
Debtor.	)
	)
CALUMET FARM, INC.	)
Plaintiff,	)
	)
v.	)
	)
FIRST NATIONAL BANK &	)
TRUST COMPANY	)
Defendants,	)
	)
v.	)
	)
WHITE BIRCH FARM, INC. and	)
PETER M. BRANT	)
Counterclaim-Defendants.	)

ORDER

A hearing was held before the Court on August 4, 1993, on proper notice to all parties, on the Motion for Summary Judgment filed in this adversary proceeding by First National Bank & trust Company ("First National"), on the Motion for Summary Judgment filed in this adversary proceeding by Calumet Farm, Inc. the "Debtor") and on the Motion for Partial Summary Judgment filed in this adversary Proceeding by White Birch Farm, Inc. and Peter M. Brant (collectively "White Birch"). Having considered the arguments of counsel, the record and the relevant authorities and having conducted a hearing and pre-trial conference with the parties on December 13, 1993, at which certain prior rulings of the Court were clarified and additional rulings were made in open court, and the Court having concluded that the funds which were sent by wire transfer on March 8, 1991 from First National to Citibank in New York, New York for deposit into the account of White Birch (the "Wire Transfer Funds") were not funds of First National but rather funds of the Debtor and that the debt owed by Debtor to White Birch on the Promissory Note dated September 30, 1986 (the "MOGAMBO Note") was in excess of the total amount of the Wire Transfer Funds, it is ORDERED as follows:

1. The motions for summary Judgment filed in this adversary proceeding by First National and by the Debtor on causes of action for unjust enrichment are overruled;

2. The motion for partial summary judgment filed in this adversary proceeding by White Birch, insofar as it seeks dismissal of the unjust enrichment claims, is hereby granted;

3. The Motion for Leave to File Second Amended Counterclaim filed by First National on December 8, 1993 is

granted only to the extent that First national shall be allowed to amend its Counterclaim and First Amended Counterclaim against white Birch to allege the causes of action designated as "Count VII" and "Count VIII" in the proposed Second Amended Counterclaim and such Motion for Leave to File Second Amended Counterclaim is otherwise denied;

4. White Birch shall have twenty (20) days from the date of entry of this Order to file and serve any pleadings permissible under applicable rules in response to the amendments to the Counterclaim and First Amended Counterclaim of First national as permitted by paragraph 3 hereof;

5. The deadline for Completion of discovery in this adversary proceeding as established by prior orders of this Court is extended to and including January 15, 1994.

DATED this 22 day of December 1993.

/s/ Joe Lee
JOE LEE, JUDGE
UNITED STATES BANKRUPTCY COURT

Supreme Court, U.S.
FILED
JUL 12 2005
OFFICE OF THE CLERK

(2)

No. 04-1689

IN THE

Supreme Court of the United States

PETER M. BRANT and WHITE BIRCH FARM, INC.,

Petitioners,

v.

WHITAKER BANK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether there is a split in the Circuits on a question of important federal law.

II. Whether the Petitioners can in a Petition for Writ of Certiorari filed in 2005 raise an issue decided by the Court of Appeals in 1997 in a previous appeal of this case.

III. Whether the Petitioners' rights to due process were violated simply because the Court of Appeals construed the facts in the case in a manner different from the Petitioners' view of the facts.

IV. Whether the Petitioners' argument beginning on page 20 of the Petition is barred by the law of the case.

V. Whether an argument over the facts of a case can be properly raised on a Petition for Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT

Whitaker Bank, Inc. (as successor by merger to First National Bank and Trust Company) is a wholly owned subsidiary of Whitaker Bank Corporation of Kentucky, which is not publicly traded.

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12 C.F.R. 210.25, *et seq.* 3

STATEMENT OF THE CASE

The Respondent does not accept the Petitioners' Statement of the Case and recital of facts, but instead adopts the description of the case and recital of the facts of the case in the Opinion of the Court below. Appendix B to the Petition for Writ of Certiorari, pp 3a to 8a.

REASONS FOR DENYING THE PETITION

I. The Petitioners in their Petition for Writ of Certiorari (the "Petition') argue that the decision of the Court below is in conflict with decisions from the Second and Seventh Circuits. This is simply not true. *Banque Worms v. BankAmerica International*, 928 F.2d 538 (2d Cir. 1991), *General Electric Capital Corporation v. Central Bank*, 49 F.3d 280 (7th Cir. 1995) and the unpublished Opinion of the Sixth Circuit in this case in 1997 (Appendix E to the Petition at page 51(a) of the Appendix (the "Appendix") all dealt with the issue of whether the "mistake of fact" rule or the "discharge for value" rule should apply in claims for restitution in wire transfer cases. All three Circuits ruled that the "discharge for value" rule applied in these cases. None dealt with the issue which was before the Court below in its 2005 Opinion.

The Court in this case recognized this, stating

> In a wire transfer setting, is the relevant event when the beneficiary's bank receives the money, or when the beneficiary learns that the money is in its account, or when the beneficiary credits the money to the debtor's account? **Neither this court's prior decision, *GECC*, nor *Banque***

> ***Worms* purports to consider the question, much less answer it.**

(Emphasis added.) *Appendix*, pp 10a, 11a.

Consequently, the statement on page 9 (and elsewhere) of the Petition that the Second and Seventh Circuits ". . . have ruled that the relevant event is when funds are credited to the beneficiary's account" is an incorrect statement of the rulings in these cases.

The Petitioners base their argument that the relevant event is when the funds are credited to the beneficiary's account upon one sentence in *General Electric Capital Corporation*, *supra*, which reads "As the (New York) Court of Appeals saw things, a creditor should be able to treat funds credited in apparent payment of a debt as irrevocably his, unless news of the error precedes arrival of the funds." *Id.* at 284. The *General Electric* decision makes no specific reference to any particular part of the *Banque Worms* decision, does not purport to be a definitive or complete statement of the discharge for value defense, and, does not explain what "arrival of the funds" means. It could mean when the money is credited to the debtor's account, as the Court below held in this case. *See id.* In addition, because the question of discharge was not raised in *General Electric*, the sentence is mere *dictum* to the extent it may be read to suggest that "discharge" is not an element of the discharge for value defense. Reliance on *dicta* to identify a circuit conflict has been proscribed by this Court. *See Cohens v. Commonwealth of Virginia*, 19 U.S. (6 Wheat) 264, 399-400 (1821).

Even if there was a split in the Circuits, certiorari should not be granted in this case because it does involve ". . . an important federal question . . ." Supreme Court Rule 10(a). "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *National Labor Relations Board v. Pittsburgh*, S.S.Co. 340 U.S. 498, 503 (1951).

While it is true that billions of dollars are transferred by wire transfer each business day, mistakes such as the mistake involved in this case are extremely rare, as evidenced by the fact that there have been only about five (5) reported cases involving such mistakes since 1990, when the Federal Reserve Board promulgated Regulation J. 12 C.F.R. 210.25, *et seq*. Consequently, this is not a case involving an important federal question or one ". . . involving principles the settlement of which is of importance to the public . . ." *National Labor Relations Board*, *supra*, p. 503.

II. Petitioners repeatedly argue in the Petition that the Court below was in error because the Respondent did not make the mistake which caused this situation. However, they also argue that this error was made in 1997 in the Court's opinion on the first appeal of this case. Petitioners state in the Petition:

> In its first opinion in this case, the Sixth Circuit held that First National had standing to seek restitution under UCC § 4A-303(a). (App. At 57a) In so ruling, the Sixth Circuit necessarily made a crucial finding of fact: that First National made

> an execution error and that Calumet did not make an order error.

Petition, p. 16.

It is obvious that an alleged error of the Court of Appeals which became final in 1997, cannot be raised in a Petition for Writ of Certiorari filed in 2005. This argument is also barred by principle of the law of the case. See Section IV of this Brief.

III. In their second argument in the Petition (page 15), the Petitioners make the novel argument that they were deprived of due process of law because the Court of Appeals viewed the facts differently than they do. In particular, they argue that the Court of Appeals decision that the Respondent made the mistake is not supported by the facts. They overlook the fact the Court of Appeals had access to the entire record and could have inferred the fact from a number of facts, such as that the Respondent settled with Calumet by paying it $50,000, released its security interest in Calumet's property and waived its right to its first $25,000 of dividends from Calumet's bankruptcy estate. Also, by asserting the claim against Petitioners, the Respondents acknowledged that it made the mistake. ". . . [W]e adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations . . ." *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927).

IV. The Petitioners' argument beginning on page 20 of the Petition is barred by the law of the case.

The Petitioners asserted before the Sixth Circuit on the appeal in this case in 1997 precisely the same legal argument concerning restitution that it now asserts – an argument that, if correct, would have warranted affirmance of the bankruptcy court's original decision.[1] Nevertheless, this Court reversed the bankruptcy court, necessarily rejecting the Petitioners' argument in the process. The Court then remanded the case solely for consideration of "whether White Birch had notice that the funds transfer had been made in error and, thus . . . whether White Birch may successfully assert [the discharge for value] defense to First National's restitution claim." Appendix, p. 61a.

White Birch next sought rehearing of the matter, once again pressing the same argument:

> The Court also appears to have overlooked White Birch's argument that, regardless of the

1. The Court specifically stated that it was considering alternative grounds for summary judgment:

> Although we believe that the bankruptcy and district courts erred as a matter of law in holding that First National lacked standing to assert a restitution claim against White Birch, we may affirm the judgment of a lower court on grounds other than those relied upon by that court. Accordingly, we must consider whether the district court's grant of summary judgment was appropriate on other grounds.

Appendix, p. 57a.

> disposition of the standing issue or the applicability of Section 4A-303(a), the dismissal of First National's restitution claims should be affirmed on the independent alternative ground that, on the undisputed facts, First National has no claim for restitution in connection with the wire transfer because it suffered no loss as a result thereof. *See* Brief of Appellees [White Birch] at 24-30. First National simply cannot have it both ways. It is not entitled to retain the $693,000.00 it debited from Calumet and seek restitution of the same amount from White Birch. White Birch was not enriched by the wire transfer. Even if White Birch had been 'enriched,' however, it was at Calumet's – not at First National's – expense. Furthermore, even if Section 4A-303(a) had application, retention by First National of the $693,000.00 excess amount over the actual amount of Calumet's payment order is contrary to the express provisions of that statute. Therefore, First National would not be entitled to seek restitution pursuant to Section 4A-303(a), even if it applied in this case.

The Court of Appeals *again* rejected White Birch's argument and denied the petition for rehearing.

In light of the Sixth Circuit's adverse disposition of the Petitioners' arguments during the first appeal, in 1997 it is barred from raising the same arguments in this Petition filed in 2005. As the Sixth Circuit explained in *Coal Resources, Inc. v. Gulf & Western Industries, Inc.*, 865 F.2d 761, 766 (6th Cir. 1986):

> Issues decided at an early state of litigation, either explicitly or by necessary inference from the

> disposition, constitute the law of the case. The [law of the case] doctrine precludes our reconsideration of the [previously decided issue] unless one of three "exceptional circumstances" exists: the evidence in a subsequent trial was substantially different; controlling authority has since made a contrary decision of law applicable to such issues; or the decision was clearly erroneous, and would work a substantial injustice.

Id. (quoting *Kori Corp. v. Wilco Marsh Buggies & Draglines*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 474 U.S. 902, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985)). None of the "exceptional circumstances" described above applies here, meaning that this Court's rejection of Petitioners' arguments in the earlier appeal should stand.

V. The Supreme Court is not the place to resolve factual disputes. Throughout the Petition, the Petitioners argue for their version of the facts, and take issue with manner in which the Court of Appeals viewed the facts or drew inferences from those facts. In *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924), this Court dismissed a writ of certiorari it had previously granted, holding:

> The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use – primarily a question of fact. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto.

Id. at 509.

The Petitioners at various places in the Petition refer to the "record" and argue that certain rulings by the Court of Appeals are not supported by the record. This Court does not have the record before it on a Petition for Writ of Certiorari, and consequently all references to the record in the Petition should be ignored.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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